No. 16-1220	
Title:	**Animal Science Products, Inc., et al., Petitioners** **v.** **Hebei Welcome Pharmaceutical Co. Ltd., et al.**
Docketed:	April 12, 2017
Linked with 16A650	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(13-4791)
Decision Date:	September 20, 2016
Rehearing Denied:	November 4, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 03 2017	Application (16A650) to extend the time to file a petition for a writ of certiorari from February 2, 2017 to April 3, 2017, submitted to Justice Ginsburg.
Jan 03 2017	Application (16A650) granted by Justice Ginsburg extending the time to file until April 3, 2017.
Apr 03 2017	Petition for a writ of certiorari filed. (Response due May 12, 2017)
Apr 25 2017	Order extending time to file response to petition to and including June 5, 2017.
Apr 27 2017	Brief amici curiae of Professors Williams S. Dodge and Paul B. Stephan filed.
May 16 2017	Letter of May 11, 2017, from counsel for petitioners received waiving the 14-day waiting period for the distribution of the petition pursuant to Rule 15.5.
Jun 05 2017	Brief of respondents Hebei Welcome Pharmaceutical Co. Ltd., et al. in opposition filed. (Distributed)
Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 13 2017	Reply of petitioners Animal Science Products, Inc., et al. filed. (Distributed)

Jun 26 2017	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 14 2017	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Nov 27 2017	Supplemental brief of respondents Hebei Welcome Pharmaceutical Co. Ltd., et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 28 2017	Supplemental brief of petitioners Animal Science Products, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 29 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 12 2018	Petition GRANTED limited to Question 2 presented by the petition.
Feb 15 2018	Blanket Consent filed by respondents Hebei Welcome Pharmaceutical Co. Ltd., et al. **Blanket Consent**
Feb 23 2018	SET FOR ARGUMENT on Tuesday, April 24, 2018.
Feb 26 2018	Brief of petitioners Animal Science Products, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 26 2018	Joint appendix filed. (Distributed) **Main Document** **Proof of Service**
Mar 01 2018	Brief amici curiae of Professors Of Conflict Of Laws And Civil Procedure As Amici Curiae In Support Of Petitioners filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 02 2018	Brief amicus curiae of Professors of International Litigation in Support of Neither Party filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Mar 05 2018	Brief amicus curiae of United States filed. **Main Document** **Proof of Service**
Mar 05 2018	Brief amicus curiae of Chamber of Commerce of The United States of America

	filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Brief amici curiae of Donald Clarke and Nicholas Calcina Howson filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 05 2018	Brief amicus curiae of American Antitrust Institute filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Brief amici curiae of Professors Samuel Estreicher and Thomas Lee filed in Support of Neither Party. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 07 2018	CIRCULATED
Mar 19 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Mar 22 2018	Joint motion of respondents and amicus curiae Ministry of Commerce of the People's Republic of China for leave to allow Ministry of Commerce of the People's Republic of China to participate in oral argument as amicus curiae and for divided argument filed. **Main Document**

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IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits.

2. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).

3. Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees in the court below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Animal Science Products, Inc. states that it has no parent company, and no publicly-held company holds 10% or more of its shares. Petitioner The Ranis Company, Inc. states that it has no parent company, and no publicly-held company holds 10% or more of its shares.

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The opinion of the United States Court of Appeals for the Second Circuit (App. 1a) is reported at 837 F.3d 175. The opinion of the United States District Court for the Eastern District of New York (App. 39a) denying Respondents' renewed motion for judgment as a matter of law is unreported but available at 2013 WL 6191945. The District Court's opinion denying Respondents' motion for summary judgment (App. 54a) is reported at 810 F. Supp. 2d 522. The District Court's opinion denying Respondents' motion to dismiss (App. 157a) is reported at 584 F. Supp. 2d 546.

JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on September 20, 2016, and denied a petition for rehearing en banc on November 4, 2016 (App. 298a). On January 3, 2017, Justice Ginsburg granted an extension of time to file a petition for a writ of certiorari until April 3, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291.

The Sherman Antitrust Act, 15 U.S.C. § 1 et seq., provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

Rule 44.1 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **Determining Foreign Law**
>
> . . . . In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1.

INTRODUCTION

This case presents three important issues—two of which are the subject of circuit splits—arising from the Second Circuit's unprecedented reversal of a pre-trial order denying Respondents' motion to dismiss Petitioners' Sherman Antitrust Act complaint under the doctrine of international comity.

Petitioners represent American importers of vitamin C. Respondents are Chinese manufacturers and exporters of vitamin C. Petitioners alleged that Respondents agreed to fix prices and restrain supply in violation of the Sherman Act. There was no dispute below that Respondents' conduct violated the Sherman Act, nor was there any dispute that the Sherman Act validly applied to Respondents' foreign conduct. Instead, Respondents' raised several defenses that were all based on the claim that Chinese law had compelled their conduct. Two different district judges—one on a motion to dismiss, the second following both summary judgment and post-trial motions—found that Chinese law had *not* required Respondents' anticompetitive conduct. At trial, a jury found for Petitioners, and found in a special verdict that Respondents' conduct had been voluntary, rather than compelled.

The Second Circuit held that the District Court's failure to abstain from exercising jurisdiction in the first place was reversible error. The panel's conclusion rested solely on the fact that the Ministry of Commerce of the People's Republic of China ("the Ministry") had appeared before the court as *amicus curiae* and insisted that Chinese law had compelled Respondents to form a cartel, engage in

price fixing and limitations on supply, and thereby violate the Sherman Act. The District Court had respectfully considered the Ministry's position, but determined that it could not be reconciled with overwhelming evidence showing that Respondents and the Chinese Government had contemporaneously described the relevant conduct as voluntary and behaved accordingly. To shield the Ministry from even the slightest judicial scrutiny, the Second Circuit sidestepped the record at trial, reached back to a pre-trial order denying Respondents' motion to dismiss, and held that the District Court abused its discretion by failing to exercise its discretion to abstain under the common law doctrine of international comity.

The panel's decision rests upon two holdings in direct conflict with the law of other Circuits. Both issues warrant review in this Court.

First, the panel improperly exercised jurisdiction over an interlocutory pre-trial order denying Respondents' motion to dismiss, in tension with this Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), and in direct conflict with the holdings of three other Circuits. In *Ortiz*, this Court held that 28 U.S.C. § 1291 does not authorize appellate jurisdiction over pre-trial orders denying summary judgment once there has been a full trial on the merits. *Id.* at 184. Instead, a litigant who seeks appellate review following a trial must preserve and raise pre-trial defenses in Fed. R. Civ. P. 50 motions for judgment as a matter of law. *Ibid.* The *Ortiz* Court did not address whether its decision similarly applies to interlocutory pre-trial motions to dismiss. However, the Sixth Circuit has held that *Ortiz* precludes appellate review of pre-trial motions after a full trial on the merits, and decisions of the Fifth and Tenth Circuits prior to *Ortiz* held the same.

The Second Circuit's decision cannot be reconciled with the rule followed in its sister circuits or the reasoning of *Ortiz* itself. By reviewing the District Court's initial pre-trial order denying Respondents' motion to dismiss based upon the pre-trial record, the panel ignored *Ortiz*'s command that the factual record developed over the course of a full trial on the merits may not be wiped away by post-trial judicial fiat. This error was not a harmless procedural mistake—because Respondents failed to preserve their international comity defense in their pre-verdict Rule 50(a) motion, there was no "final decision" over which the panel had appellate jurisdiction to review Respondents' comity defense.

Second, the panel held that the District Court abused its discretion by declining to defer to the assertion in the Ministry's amicus brief that Respondents' conduct was compelled. The panel acknowledged that the District Court had carefully and thoughtfully weighed the record evidence relating to the voluntariness of Respondents' conduct, including several statements and materials from the Ministry itself. The panel did not conclude that the District Court had erred in *how* it weighed this evidence, but instead held that the entire exercise was an abuse of discretion because the Ministry had appeared in the litigation. According to the Second Circuit, that appearance *by itself* meant that the District Court was "bound to defer" to the Ministry's interpretation. The Second Circuit's rule of deference-on-appearance aligns with that of the Ninth Circuit, and conflicts with the deference standards applied to the legal statements of foreign sovereigns in the Fifth, Sixth, Seventh, Tenth, Eleventh and D.C. Circuits. Absent clear guidance from this Court, foreign sovereigns and opposing litigants will

be left to navigate a patchwork of inconsistent federal rules, and the lower courts will lack certainty regarding the scope of their authority over foreign legal questions under Fed. R. of Civ. P. 44.1.

The Second Circuit's deference standard threatens to undermine the federal antitrust laws by issuing a "get out of jail free" card to any foreign defendant whose home government comes to its defense. A foreign government's views about whether its laws required a defendant to engage in anticompetitive conduct are certainly entitled to respect, but the measure of that respect should not require a district court to ignore all contrary evidence simply because the foreign government appears as *amicus curiae*. By requiring deference to foreign government statements at the motion-to-dismiss stage, regardless of what the record evidence shows, the panel has drawn a road-map for foreign cartels to violate U.S. law with impunity.

A final question also warrants this Court's review. The panel's decision incorrectly answered an important question that this Court left unanswered in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993)—namely, whether the doctrine of international comity authorizes case-by-case abstention from exercising otherwise valid jurisdiction under the Sherman Act. This Court has never approved of the comity-inspired abstention doctrine on which the panel relied. To the contrary, the Court rejected as "too complex to prove workable" a similar case-by-case abstention approach to the Foreign Trade Antitrust Improvements Act (FTAIA). *F. Hoffman-La Roche Ltd.* v. *Empagran*, 542 U.S. 155, 168 (2004). Despite the reasoning of *Empagran*, the opinion below held that

the application of the antitrust laws to foreign conduct is a matter for case-by-case judicial discretion, rather than a question that Congress has answered by statute. This Court should grant certiorari to clarify that the panel's discretionary ten-factor balancing test is not a valid basis for abstaining from the exercise of federal jurisdiction.

STATEMENT OF THE CASE

Respondents are two Chinese vitamin C manufacturers and exporters who, along with several co-conspirators, "fixed prices and agreed on output restrictions" in violation of U.S. antitrust laws. App. 56a. Respondents have not disputed these facts, nor have they contested that the U.S. antitrust laws validly applied to their extraterritorial conduct. App. 6a, 14a, 56a, 163a. Instead, Respondents have claimed that they are immune from liability because Chinese law compelled their anticompetitive conduct. App. 163a.

At the motion-to-dismiss stage, the District Court declined to afford binding deference to the Ministry's interpretation of Chinese law, which was presented in the form of an unsworn amicus brief. The court's decision was informed in part by the underlying legal documents cited by the Ministry, and in part by the "plain language of the documentary evidence submitted by plaintiffs [which] directly contradicts the Ministry's position." App. 181a. The panel held that the District Court's "careful and thorough treatment of the evidence before it . . . would have been entirely appropriate" had the Chinese Government "not appeared in this litigation." App. 30a n.10. In conflict with the standards of review applied in most other circuits, however, the panel held that the Ministry's appearance

as an amicus transformed a "careful and thorough treatment" into an abuse of discretion.

1. Respondents are members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber") and its "Vitamin C Subcommittee." App. 56a. Like similar Chinese chambers of commerce established in the 1980s as China began its transition to a market economy, the Chamber is a private "social organization" with a mix of private and public functions. App. 58-59a.

The Ministry is China's "highest authority . . . authorized to regulate foreign trade." App. 6a. In 1997, the Ministry promulgated regulations (the "1997 Notice") setting export quotas for vitamin C, requiring licenses for the export of vitamin C, and directing the Chamber to improve its coordination on vitamin C exports. App. 62a. The 1997 Notice also required the Chamber to establish a "Vitamin C Subcommittee" and required all vitamin C exporters to participate in the Subcommittee. App. 62a. Finally, the 1997 Notice directed the Vitamin C Subcommittee to establish a minimum export price of its own choosing. App. 62a-63a. The Vitamin C Subcommittee determined that it would punish those Subcommittee members who departed from the agreed-upon price through various escalating means, the most serious of which was by revoking their Subcommittee membership and then recommending that the Ministry revoke the offending company's license to export vitamin C. App. 63a.

This export regime lasted for five years. By the end of 2001, Chinese vitamin C manufacturers and exporters had taken advantage of low domestic production costs and

"captured over 60% of the worldwide market for vitamin C," and China's "share of vitamin C imports to the United States" had reached 80%. App. 159a.

In 2001, China became a member of the World Trade Organization ("WTO"), and instituted fundamental changes to its vitamin C export regime "in order to accommodate the new situations since China's entry into WTO." App. 172a. As one of its first policy changes upon accession to the WTO, the Ministry repealed the 1997 Notice, including its requirement that along with other regulations had imposed export license and quota requirements on the vitamin C industry. App. 64a. In its place, the Ministry instituted an export regime known as Price Verification and Chop ("PVC"), in order to keep Chinese exports (including vitamin C) clear of WTO anti-dumping concerns. App. 65a-66a. In the post-2002 regime, vitamin C exports were "no longer subject to supervision and review by customs." App. 65a. Instead, the Chamber was supposed to review an export contract, ensure that it complied with applicable industry standards, and then affix a "chop"—a stamp—to the contract to signal its compliance. App. 65a. If an export contract lacked a proper "chop," Chinese customs was to forbid the goods from leaving China. App. 65a-66a. At trial it was shown that only a handful of vitamin C contracts for sales in the U.S. were subject to this procedure. App. 244a-245a.

During this transition to a new regulatory scheme for vitamin C exports, Respondents and several other vitamin C manufacturers began their anticompetitive activities. App. 78a-82a. Over the next several years, Respondents and their fellow cartel members attended meetings facilitated by the Chamber and voluntarily

agreed to fix export prices and volumes, including for export to the United States. App. 82a-93a. The cartel was able to maintain prices "substantially above competitive levels." App. 161a. The cartel—acting at Subcommittee meetings—also repeatedly agreed to restrict vitamin C export volumes, even agreeing to shut down production at certain times to limit supply and fend off price drops. App. 161a-162a.

By the time this case reached the motion-to-dismiss stage, the record overwhelmingly showed that the Chinese government had not compelled Respondents to fix prices after 2001. App. 173a-179a. That evidence included public pronouncements from the Chinese Government regarding its deregulation of vitamin C prices, App. 173a, direct statements from Respondents describing the voluntary association that they had joined, App. 176a, evidence that certain Respondents had sold vitamin C at prices that were multiples above the mandatory price point they contended existed, App. 175a-176a, and even statements from Respondents showing that the entire notion of a "compulsion" defense had been manufactured for litigation purposes, App. 178a.

2. On January 26, 2005, Petitioners filed a complaint in the Eastern District of New York against Respondents and several other defendants, alleging Sherman Act violations. App. 88a. The Judicial Panel on Multidistrict Litigation consolidated two other actions with that complaint before the late Judge Trager. App. 157a-158a.

Respondents moved to dismiss the complaints, arguing that Petitioners' claims were barred by the doctrines of foreign sovereign compulsion, act of state,

and international comity because their allegedly anticompetitive conduct had been compelled by Chinese law. App. 163a. The legal authority on which Respondents' arguments rested was an amicus brief filed by the Ministry, which argued that Chinese law had compelled Respondents' conduct. App. 212a, 217a, 221a. Respondents argued that the court was obliged to accept the Ministry's amicus brief "as true, because it [contained] the official position of the government of China." App. 168a. Notably, the brief did *not* claim that the Chinese legal system recognizes the Ministry of Commerce as an authoritative interpreter of Chinese law. App. 189a-223a.

Judge Trager denied the motion to dismiss following limited discovery on November 6, 2008. App. 188a. Judge Trager explained that the standard of deference due to the Ministry's amicus brief was dispositive to his decision, because the legal documents attached to the Ministry's brief suggested "on their face that defendants' acts were voluntary rather than compelled." App. 179a. Surveying the applicable precedents following the adoption of Fed. R. Civ. P. 44.1, Judge Trager concluded that the Ministry's legal interpretation did not have to be treated as "conclusive," but was entitled to "substantial deference." App. 181a. Applying that standard, Judge Trager concluded that the record "was simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," App. 186a, in part based on Respondents' own documents but also based upon "documentary evidence submitted by plaintiffs [that] directly contradict[ed] the Ministry's position." App. 181a. Judge Trager reasoned that further discovery would shed light on the question whether Respondents' actions in coordinating pricing were voluntary or mandatory. App. 186a & n.12.

Respondents sought to certify the order denying their motion to dismiss for interlocutory appeal, but Judge Trager denied the request. App. 225a-226a, 232a.

3. Following the conclusion of discovery, Respondents moved for summary judgment, again arguing that "they were compelled by the Chinese government to fix prices," and that the case should be dismissed based upon the same three doctrines raised in their motion to dismiss. App. 55a.[1]

The District Court denied the motion for summary judgment. App. 56a. With respect to Respondents' comity defense,[2] the court held that the "continuing validity" of the *Timberlane* "comity balancing test"[3]—a ten-factor test developed by the Ninth and Third Circuits to guide case-by-case abstention in Sherman Act cases involving extraterritorial conduct—was "unclear after the Supreme Court's decision addressing comity in *Hartford Fire*." App. 100a. Applying *Hartford Fire*, the court held that

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1. By this time, Judge Trager had passed away, and the consolidated action had been reassigned to Judge Brian M. Cogan. App. 58a.

2. The District Court rejected the defense of foreign sovereign compulsion because Respondents had failed to meet their burden to prove that their anticompetitive conduct was "compelled" with the threat of "penal or other severe sanctions." App. 102a-104a. The District Court further held that the act of state doctrine did not apply because the case did not require the court to inquire into the legality or validity of a foreign sovereign's official act. App. 108a-116a.

3. App. 15a-16a; *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977).

regardless of the continuing viability of the *Timberlane* factors, "unless [Respondents'] price-fixing was compelled by the Chinese government, dismissal on comity grounds would not be justified." App. 102a.

To decide whether Chinese law actually compelled Respondents' conduct, the District Court considered the Ministry's motion-to-dismiss-stage amicus brief, as well as a subsequent 2009 Ministry statement about the regulatory regime governing Chinese vitamin C exports. App. 118a-122a. The court found that the Ministry's statements were entitled to respect, and deferred to the Ministry's "explanation of the relationship between the Ministry and the Chamber," App. 118a-119a & n.37. But the court concluded, "based on what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber—that the [post-2001] regime did not compel [Respondents'] conduct." App. 118a-119a.

The District Court found that the high-level legal conclusions advanced in the Ministry's amicus brief contained gaps and ambiguities, and failed to address "critical provisions" of the relevant legal regime. App. 119a. As Judge Trager had found at the motion-to-dismiss phase, Judge Cogan found that certain of the Ministry's statements were directly contradicted by the documentary evidence relating to compulsion before the court. App. 121a-122a. For example, the court pointed to language on the Chamber's website and in other public materials stating that the vitamin C industry's price coordination was the product of "self-restraint," arrived at "voluntarily," "*without any government intervention*,"

and "*completely implemented by each enterprise's own decisions.*" App. 79a-81a (emphasis added).

Finally, while noting that this was "not dispositive on the question of the appropriate deference to be afforded to statements by foreign governments," the District Court held that because the "alleged compulsion [was] in [Respondents'] own self-interest, a more careful scrutiny of [the Ministry's] statement [was] warranted." App. 121a. The court concluded that the Ministry's legal position appeared to be an "attempt to shield [Respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question." App. 121a-122a. Applying Rule 44.1 to the summary judgment record, the court held that Respondents had not demonstrated that Chinese law in fact compelled Respondents' particular anticompetitive conduct and rejected Respondents' comity defense. App. 56a.

4. The case proceeded to trial. During the course of a three-week trial, the jury heard testimony from the head of the Vitamin C Subcommittee, Qiao Haili, who claimed there was government compulsion. The jury then heard deposition testimony in which Mr. Qiao said it was "accurate" that "export prices are fixed by enterprises *without* government intervention." App. 295a (emphasis added) Mr. Qiao further admitted that "on the whole, the government did not involve itself in price fixing," and that after 2002, no price limitations or agreements on export quantities went forward without the support of the majority of the vitamin C manufacturers. App. 295a. Mr. Qiao even confirmed that it was "perfectly acceptable" for the companies to decide to have *no minimum prices at*

all, App. 296a, and that no vitamin C company was ever punished for charging less than the minimum price, App. 249a. In July 2003, Mr. Qiao wrote a memo to the Ministry that showed that the compulsion defense in this case was never true; at trial he denied the memo was about vitamin C, and was shown to have fabricated his testimony.

After the close of evidence, Respondents made an oral motion for judgment as a matter of law under Fed. R. Civ P. 50(a). App. 250a. Respondents' Rule 50(a) motion did not move for judgment as a matter of law on the basis of comity. App. 250a-275a. Instead, the motion raised three defenses: first, the sufficiency of the evidence to establish Respondent North China Pharmaceutical Group Corp.'s liability, App. 256a-258a; second, the act of state doctrine, App. 253a-255a; and third, the doctrine of foreign sovereign compulsion, App. 256a. The court reserved decision on the first ground and denied judgment as a matter of law on the latter two. App. 273a-275a.

After the jury returned a verdict for Petitioners, App. 276a-279a, Respondents moved again for judgment as a matter of law, this time under Rule 50(b). This time, Respondents also raised the independent ground that international comity required dismissal of Petitioners' suit. App. 41a. The court denied the motion on all grounds. App. 53a.

5. The Court of Appeals did not rule on Respondents' Rule 50(b) motion, but instead reviewed Judge Trager's 2008 order denying Respondents' initial motion to dismiss, reversed that order, vacated the jury verdict, and remanded with instructions to enter judgment dismissing Petitioners' complaint with prejudice. App.

3a. The court did so relying solely on the grounds that comity required the court to abstain from adjudicating Petitioners' claims, and without explaining the basis for its appellate jurisdiction over Respondents' pre-trial motion to dismiss.[4]

The Second Circuit held that "exercising jurisdiction over antitrust violations that occur abroad" raises "unique international concerns" requiring federal courts to consider whether comity bars the exercise of jurisdiction—even where the Sherman Act indisputably reaches the foreign conduct, and entirely separate from any inquiry involving the defense of foreign sovereign compulsion. App. 14a-15a. The court explained that "[t]o determine whether to abstain from asserting jurisdiction on comity grounds," it would "apply the multifactor balancing test set out in" *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977) (seven factors) and supplemented by *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (ten factors). App. 14a-15a.

The first of those "*Timberlane* factors," the Second Circuit explained, required the court to determine whether there was a "true conflict" between U.S. and Chinese law. App. 16a. The Second Circuit reasoned that "if Chinese law required [Respondents] to enter into horizontal price-fixing agreements," a "true conflict" would exist between U.S. and Chinese law, even if

4. At no time in their merits briefing before the Second Circuit did Respondents urge reversal of the order denying their initial motion to dismiss. Instead, Respondents simply urged reversal of the District Court's Rule 50(b) order.

Respondents entered into different horizontal price-fixing agreements than the agreements that Chinese law required. App. 19a. The panel explicitly held that the District Court erred in even *considering* factual material—available at both the motion-to-dismiss record and on summary judgment—that contradicted the Ministry's claim that Chinese law compelled Respondents' conduct. App. 32a ("We are disinclined to view this factual evidence of China's unwillingness or inability to enforce the PVC regime as relevant to the PVC regime's legal mandate."); App. 32a-33a ("Even if [Respondents'] specific conduct was not compelled by the 2002 Notice, that type of conflict is not required for us to find a true conflict between the laws of the two sovereigns. . . . Whether [Respondents], in fact, charged prices in excess of those mandated by the 2002 Notice does not weigh heavily into our consideration of whether the PVC regime, *on its face*, required [Respondents] to violate U.S. antitrust laws in the first instance.") (emphasis added).

The Second Circuit held that Judge Trager had abused his discretion by failing to defer to the Ministry's amicus brief at the motion-to-dismiss stage. App. 37a. The panel held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction *and effect* of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court *is bound* to defer to those statements."[5] App. 25a (emphasis added). Notwithstanding

5. Although the Second Circuit referred to a "sworn evidentiary proffer," no such "sworn" proffer was ever before the District Court, including when Judge Trager denied Respondents'

its nod to a reasonableness standard, the panel made clear that the bare fact of the Ministry's appearance as *amicus curiae* was dispositive: "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required *at both the motion to dismiss and summary judgment stages would have been entirely appropriate.*" App. 30a n.10 (emphasis added). In sum, because the Ministry appeared in the litigation, the District Court was "bound to defer" to the Ministry's assertions regarding *both* the construction and effect of Chinese law regardless of any contrary record evidence. App. 25a. Thus, based solely upon the Ministry's appearance, the panel accepted as binding the Ministry's assertion that there was a "true conflict" between the Sherman Act and Chinese law, applied the remaining *Timberlane* factors, and concluded that comity barred Petitioners' suit.

Petitioners moved for panel rehearing and rehearing en banc, arguing *inter alia* that the District Court's order denying Respondents' motion to dismiss was "not reviewable" under this Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). App. 291a. The petition for rehearing was the first point at which Petitioners could have raised this argument, because Respondents did not request appellate review of the District Court's pre-trial order denying their motion to dismiss in their briefs before the Second Circuit. The Second Circuit denied the petition, and this petition for certiorari followed.

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motion to dismiss. Instead, as Judge Trager himself noted, the Ministry had merely filed an amicus brief signed by its counsel, who had entered into a joint defense agreement with Respondents. App. 230a-232a, 237a-238a.

REASONS FOR GRANTING THE PETITION

A. The Panel Erred in Exercising Jurisdiction Over a Pre-Trial Order Denying a Motion to Dismiss, Creating a Clear Split with Three Other Circuits.

1. The Court of Appeals decision to review and reverse the District Court's 2008 interlocutory order denying Respondents' motion to dismiss—ignoring Respondents' post-trial Rule 50 motion—creates a split with three other circuits regarding the scope of appellate jurisdiction over pre-trial motions to dismiss.

Under 28 U.S.C. § 1291, the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." In *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), this Court interpreted § 1291 to preclude a party from appealing an order denying summary judgment after a trial on the merits, because the order "retains its interlocutory character as simply a step along the route to final judgment." *Id.* at 184. The Court explained that after a trial, "the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ibid.* The decision in *Ortiz* was unanimous for the proposition that "a party ordinarily cannot appeal an order denying summary judgment after a full trial on the merits," and a court of appeals "lack[s] jurisdiction to review" such an order). *Id.* at 192 (Thomas, J., concurring in judgment).

Following *Ortiz*, the clear majority view is that pre-trial orders denying motions to dismiss, like motions denying summary judgment, may not be reviewed following trial. Instead, the Fifth, Sixth, and Tenth Circuits have held

that pre-trial motions to dismiss retain their interlocutory character, and that an unsuccessful moving party must renew its arguments in Rule 50 motions to raise them on appeal. *See Nolfi* v. *Ohio Ky. Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012) (holding that *Ortiz* "precludes . . . consideration of appeal from the district court's denial of [a] motion to dismiss"); *ClearOne Commc'ns, Inc.* v. *Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011) (holding that "a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a Rule 12(b)(6) motion to dismiss, but must instead challenge the legal sufficiency of the plaintiff's claim through a motion for judgment as a matter of law"); *Bennett* v. *Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) dismissal becomes moot."); *In re Gollehon*, No. CO-14-031, 2015 WL 1746496, at *5 (B.A.P. 10th Cir. Apr. 17, 2015) ("Perhaps at some point in the future, the Tenth Circuit will definitively rule that in limited instances a denial of a motion to dismiss is appealable following trial and final judgment. But until such time, we decline to push that boundary . . . ."). The decision below creates a split with the Fifth, Sixth, and Tenth Circuits on the question whether 28 U.S.C. § 1291 confers jurisdiction to review an interlocutory order denying a motion to dismiss following a trial on the merits.[6]

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6. There is a further split of authority—not implicated here—regarding appellate jurisdiction to review "purely legal" questions that are raised in a pretrial motion but not preserved in post-trial Rule 50 motions. *See Feld* v. *Feld*, 688 F.3d 779, 781-783 (D.C. Cir. 2012) (collecting cases). Whatever may be the merits of the "controversial" exemption for "purely legal" questions, *see Empress Casino Joliet Corp.* v. *Balmoral Racing Club, Inc.*, 831 F.3d 815, 824 (7th Cir. 2016), it is inapplicable here

2. The question presented warrants review in this Court. The jurisdictional limits imposed by 28 U.S.C. § 1291 promote the objectives of judicial economy and finality. Permitting appellants to re-litigate any pre-trial interlocutory order outside of the context of Rule 50 motions would "enable litigants to extend" their dispositive objections in the district court "simply by adoption of the expedient of an appeal." *Cone* v. *W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947). "Congress, in enacting present §§ 1291 & 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship." *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 746 (1976). And litigants have "ample" opportunity to raise any argument raised in a motion to dismiss via an order that *is* final. *Ibid.*

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because Respondents' motion to dismiss raised a comity defense that the panel itself conceded is not a "purely legal" question, but rather involves the application of a ten-factor test including factual considerations. App. 34a; *see GAMCO Inv'rs, Inc.* v. *Vivendi Universal, S.A.*, 838 F.3d 214, 223 n.5 (2d Cir. 2016) (a court of appeals does not have jurisdiction to review an order denying summary judgment where factual issues contributed to the grounds for denial); *see also Drexel Burnham Lambert Grp. Inc.* v. *Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) (international comity analysis requires factual development); *Pan E. Expl. Co.* v. *Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) ("the considerations necessary to decide whether to extend comity" are "inextricably bound with the facts relevant to the merits").The panel's "true conflict" analysis was central to its decision, but that was only *one* of ten factors the court considered. Notably, in *Timberlane* itself, the Ninth Circuit reversed the district court's pretrial *dismissal* of the plaintiff's claims, noting that "the Supreme Court has expressed disapproval of summary disposition in this type of case." *Timberlane*, 549 F.2d at 602.

3. This case presents an ideal vehicle to consider the question presented. The panel's conclusion that it had appellate jurisdiction over Respondents' motion to dismiss was dispositive of its consideration of the comity defense, because that defense was not properly preserved in Respondents' motion for judgment as a matter of law. Before the case was submitted to the jury, Respondents failed to raise their comity defense in their Rule 50(a) motion. App. 250a-275a. Under clearly established Second Circuit law, Respondents' failure to raise comity as a defense in their pre-verdict Rule 50(a) motion barred them from seeking relief on that ground in their post-verdict Rule 50(b) motion, and on any appeal from the order denying that motion. *Lore* v. *City of Syracuse*, 670 F.3d 127, 152-53 (2d Cir. 2012) ("In order for a party to pursue a request for JMOL on appeal, the party must have made timely motions for JMOL in the district court. . . . A Rule 50(a) motion requesting judgment as a matter of law on one ground but omitting another is insufficient to preserve a JMOL argument based on the latter. . . . Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. . . .") (citations omitted).

The panel's review of Respondents' comity defense was permissible if, and only if, 28 U.S.C. § 1291 permits review of a pre-trial motion to dismiss that has not been properly incorporated into a Rule 50 motion following trial. That precise question is the subject of the split described above. This Court should grant certiorari to provide needed guidance to the courts of appeals.

B. The Second Circuit's Rigid Standard of Deference to Foreign Sovereign Statements Deepened an Important Circuit Split.

1. The holding at the core of the panel's decision—that a court is "bound to defer" to a foreign governmental entity's interpretation of its domestic law when that entity appears in the litigation—conflicts directly with the rules applied in at most other circuits and exacerbates widespread disarray regarding the proper standard of deference to foreign sovereigns in the context of Rule 44.1.

In *United States* v. *Pink*, 315 U.S. 203 (1942), this Court concluded that an interpretation of a Russian decree offered in the form of an "official declaration" by a Russian official who had the legal authority to "interpret existing Russian law" was "conclusive" with respect to the question of the decree's extraterritorial effect under Russian law. Since the adoption of Fed. R. Civ. P. 44.1 in 1966, the courts of appeals have diverged over whether and how to apply *Pink*'s "conclusive" formulation to legal statements offered by foreign sovereigns who participate in U.S. litigation as parties or amici. The Sixth and D.C. Circuits, in direct conflict with the decision below, have declined to defer to appearing sovereigns' interpretations of their domestic laws, while the Fifth, Seventh, and Eleventh Circuits each applies its own flexible standard of deference taking into account a variety of factors that would have counseled against deference here. Meanwhile, the opinion below aligned the Second Circuit with the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1471,1474 & n.7 (9th Cir. 1992), which reflexively deferred to an interpretation of Chinese law proffered by a corporate "arm of the

[Chinese] government," *id.* at 1471. In sum, the Ministry's amicus brief could have been subjected to any one of at least three different standards of deference applied by the courts of appeals, the selection of which would likely have been outcome determinative.

The standard of deference applied by the Court of Appeals conflicts directly with the standard applied by the D.C. Circuit. In *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012), the D.C. Circuit held—over Iran's objections—that Iranian law afforded plaintiffs with a private right of action that would allow their suit to proceed against Iran in U.S. federal court. *Id.* at 1078-82; see also *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001), (exercising Rule 44.1 authority to interpret Iranian law, rejecting Iran's interpretation of Iranian law, and adopting a different interpretation based on evidence in the record including Iran's own proffered evidence and legal materials); *McKesson Corp.* v. *Islamic Republic of Iran*, 753 F.3d 239, 242-243 (D.C. Cir. 2014) (conducting a Rule 44.1 analysis later in the same litigation, and this time *agreeing* with Iran's interpretation of its own laws as to attorney's fees). At no point in the *McKesson* litigation did the D.C. Circuit defer to Iran's proffered interpretation of its own laws. The D.C. Circuit has elsewhere expressed its skepticism that applying a rule of deference to foreign legal interpretations would be consistent with Rule 44.1. *Riggs Nat'l Corp. & Subsidiaries* v. *Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) ("We are . . . hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised") (citing Fed. R. Civ. P. 44.1).

The Sixth Circuit has also declined to require deference to foreign sovereigns appearing in litigation. In *Chavez* v. *Carranza*, 559 F.3d 486 (6th Cir. 2009), the Sixth Circuit rejected the arguments in an amicus brief filed by the Republic of El Salvador, and affirmed a jury verdict holding Nicolas Carranza liable under the Alien Tort Statute and the Torture Victims Protection Act for atrocities committed in El Salvador by Salvadoran Security Forces. Invoking international comity, Carranza had protested at trial that the Salvadoran Amnesty Law, an important element of the peace accords that ended eleven years of civil war, "preclud[ed] criminal or civil liability for political or common crimes committed" prior to the signing of the peace accords. *Id.* at 490, 494-95. On appeal, the Republic of El Salvador filed an amicus brief in which it argued that the judgment below constituted "an unwarranted intrusion into the sovereign affairs of another nation" and "undermine[d] the very vehicle of El Salvador's transformation." Brief of the Republic of El Salvador as Amicus Curiae at 4-5, *Chavez* v. *Carranza*, No. 06-6234 (6th Cir. Apr. 18, 2008). The Sixth Circuit rejected the notion that it was bound to defer to El Salvador's amicus brief—instead, it ignored El Salvador's arguments and concluded that the Amnesty Law did not preclude the plaintiffs' suit. *Chavez*, 559 F.3d at 495-96.

Three other circuits apply standards of deference that are far more searching than the panels' "bound to defer" approach.

The Eleventh Circuit has held that the "initial foreign law determination . . . is a question of law for the court," (under Fed. R. Crim. P. 26.1, a parallel provision to Fed. R. Civ. P. 44.1), and that although it is "logical" to "assume

that statements from foreign officials are a reliable and accurate source" of authority on foreign law, a court is not bound to defer to those statements when the foreign nation's official position has changed. *United States* v. *McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003). In reaching its conclusion, the court rejected an amicus brief filed by the Honduran government arguing that the defendants "violated no Honduran law," and that the court's refusal to accept this interpretation would violate "the international principles of comity which require nations to give deference to the laws and procedures of other sovereign states." Brief Amicus Curiae of the Embassy of Honduras at 8, 32, *United States* v. *McNab*, 2002 WL 32919784 (11th Cir. June 6, 2002).

The Fifth Circuit "recognizes the difficulty" that may arise in the course of adjudicating Rule 44.1 questions, and has held that "courts *may* defer to foreign government interpretations." *Access Telecom, Inc.*, v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (emphasis added). That rule of permissive deference includes important caveats that would have made a difference in this case. For example, in *Access Telecom*, the court refused to defer to an interpretation of Mexican law proffered by a Mexican administrative agency, in part because of ambiguities in the agency's proffered interpretation, and in part because "the evidence . . . [did] not persuasively show that the [Mexican agency] was empowered to interpret Mexican law" in the first place. *Ibid.*

Finally, the Seventh Circuit holds that federal courts owe "substantial deference to the construction [a foreign sovereign] places on its domestic law." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

Accordingly, the Seventh Circuit deferred to a foreign sovereign's proffered interpretation of its domestic law in circumstances where 1) the sovereign government (France) appeared in federal court and 2) offered a view of its law that was both plausible and consistent with its stated views through many years of domestic and international litigation on the subject in question. *Id.* at 1312-13.

2. It is vitally important that the federal courts apply a consistent and coherent standard of deference to interpretations of foreign law offered by foreign sovereign governments. Clarity and uniformity are essential where judicial rules govern the treatment of foreign sovereigns in federal court. *Cf. Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2086 (2015) (noting the importance of a "single policy regarding which governments are legitimate in the eyes of the United States and which are not" and stressing that assurances regarding the treatment of foreign sovereigns in U.S. courts "cannot be equivocal"). Uniformity is particularly important given the frequency with which modern foreign sovereigns appear as litigants in U.S. courts—inconsistent treatment of foreign sovereign statements creates a potential for diplomatic conflicts and risks forum shopping. Litigants and judges should understand the rules that govern the interpretation of foreign law, and those rules should not depend upon the Circuit that ultimately has jurisdiction over a given claim.

This question is also important to ensure the consistent application of U.S. antitrust laws to foreign conduct. As illustrated by multiple guilty pleas, criminal fines, and prison sentences in the 1990s, European manufacturers F. Hoffmann La Roche, Ltd. of Switzerland, Merck KgaA

and BASF AG of Germany, Takeda Chemical Industries, Ltd. of Japan, and other companies around the world formed one of the world's largest and most infamous illegal cartels to suppress competition and fix prices for a range of vitamins, including vitamin C.[7] Under the panel's approach, all of that prosecuted conduct, and other conduct like it, would be immunized in any country whose government chose to appear in U.S. court and assert that their law compelled the anticompetitive conduct. As the Eleventh Circuit warned in rejecting a rule of binding deference to foreign sovereign legal statements, "it is not difficult to imagine a . . . defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials" to alter the foreign law at issue in order to immunize him from liability in the United States. *McNab*, 331 F.3d at 1242. "Such a scenario would completely undermine the purpose" of the U.S. laws at issue. *Id.*

Further percolation is unwarranted. *Pink* was decided three-quarters of a century ago, and Rule 44.1 has been on the books for nearly as long. The divergent approaches of the circuits have been afforded adequate time to develop, and continued confusion threatens to undermine U.S. law and introduce needless complications into foreign relationships. Other countries may question why China's Commerce Ministry has received more favorable treatment from U.S. courts than, for example, Mexico's Secretary of Communications and Transportation. *See Access Telecom*,

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7. *See* U.S. Dep't of Justice Press Release Dated May 20, 1999, https://www.justice.gov/archive/atr/public/press_releases/1999/2450.htm; Victoria Broadbent, *Vitamin Companies Back in Court*, BBC News (Feb. 7, 2013), http://news.bbc.co.uk/2/hi/business/2737835.stm.

197 F.3d at 702. The danger of inconsistency is particularly acute in the antitrust context, where the United States maintains complex relationships with foreign trading partners that are undermined by warring judicial rules.

3. This case presents an ideal vehicle to consider this recurring question. The standard of deference owed to the Ministry's amicus brief was dispositive to the outcome of the litigation. The District Court understood this. App. 179a ("The authority of the Ministry's brief is critical to defendants' motion, because . . . the documents on which defendants rely to demonstrate governmental compulsion of their anti-competitive acts suggest on their face that defendants' acts were voluntary rather than compelled"). So, too, did the Second Circuit. App. 30a n.10. ("[I]f the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate."). But for the Second Circuit's deference to the Ministry's brief, the jury's verdict would not have been disturbed.

C. This Court Should Clarify Whether Courts Have Discretionary Authority to Abstain from Otherwise Valid Sherman Act Jurisdiction over Foreign Conduct.

1. The merits of this case raise a third question that is of exceptional importance: whether a court may abstain from exercising Sherman Act jurisdiction based upon a case-by-case international comity analysis.

This Court has never countenanced a case-by-case approach to abstention from Sherman Act jurisdiction on international comity grounds. The comity doctrine on which the panel relied first surfaced in the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of Am.*, 549 F.2d 597 (1977), which held that even where the jurisdictional requirements for an extraterritorial application of the Sherman Act are satisfied, international comity provides an independent basis for a U.S. court to decline jurisdiction over a Sherman Act claim. *Id.* at 613-15; *see generally* Areeda & Hovenkamp, Antitrust Law ¶ 273, at 375-83 (4th ed. 2013). *Timberlane* thus created an exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *see* Areeda & Hovenkamp ¶ 273, at 378 ("The distinctive holding of *Timberlane* is that notwithstanding sufficient effects and an antitrust violation, the court may still decline to assert its extraterritorial jurisdiction" on the basis of its multi-factor comity test); *id.* ¶ 273 at 359-60 (following *Timberlane*, "several lower courts . . . expressly acknowledge a judicial discretion to decline to exercise the jurisdiction conferred").[8]

In *Hartford Fire*, this Court reserved decision on the question whether international comity is *ever* an appropriate basis for abstention from otherwise valid Sherman Act jurisdiction. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993) ("[E]ven assuming that in a proper case a court may decline to exercise

8. The panel explicitly relied upon *Timberlane*'s formulation of the comity test, as supplemented in *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). App. 34a.

Sherman Act jurisdiction over foreign conduct . . . international comity would not counsel against exercising jurisdiction in the circumstances alleged here."). In *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court rejected the contention that courts should take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Id.* at 168. The Court explained that such an approach was "too complex to prove workable," requiring courts "to examine how foreign law, compared with American law, treats not only price fixing but" countless other anticompetitive arrangements, "in respect to both primary conduct and remedy." *Ibid.* Instead, this Court adopted a uniform, predictable comity-inspired rule, interpreting the FTAIA to exclude cases "where foreign injury is independent of domestic effects" from federal antitrust jurisdiction across the board. *Id.* at 169. With respect to cases like the present one, in which substantial domestic effects have been established, *Empagran* recognized that "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165.

It is unclear whether the *Timberlane* test remains appropriate following *Empagran*'s rejection of case-by-case abstention. *Empagran*, not *Timberlane*, is more consistent with the historic approach to comity in the Sherman Act context. Writing for a Second Circuit panel that sat as a court of last resort, Judge Learned Hand acknowledged that principles of comity should inform a court's interpretation of the Sherman Act's "general

words." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). But when deciding whether the Sherman Act reached foreign conduct, the courts are "concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it." *Ibid.* *Empagran* reaffirmed *Alcoa*'s approach. *Empagran*, 542 U.S. at 165-69. So too did *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), which rejected a case-by-case approach to the extraterritoriality of § 10(b) of the Securities Exchange Act of 1934 in favor of a straightforward exercise in statutory interpretation. *Ibid.* at 261 (holding that the appropriate rule, "[r]ather than [to] guess anew in each case," was to interpret the statute across-the-board against extraterritoriality for *all* cases, thus "preserving a stable background against which Congress can legislate with predictable effects").

The panel's decision is not only at odds with this Court's decisions, it is also out of step with lower court decisions that have treated the extraterritorial limits of Sherman Act jurisdiction as a question of statutory interpretation rather than case-by-case abstention. *See, e.g.*, *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-39 (8th Cir. 2007) (interpreting the scope of the Sherman Act in light of "prescriptive comity"); *Empagran S.A.* v. *F. Hoffmann-LaRoche Ltd* ("*Empagran II*"), 417 F.3d 1267, 1271 (D.C. Cir. 2005) (same); *Indus. Inv. Dev. Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982) ("We also disagree with [*Timberlane* and other cases'] suggestion . . . that the question whether to entertain the suit is discretionary with the trial judge. A decision not to apply the antitrust laws must be based on solid legal ground; the question is one of interpreting the

scope that Congress intended to give the antitrust laws."), *cert. granted, vacated, and remanded on other grounds*, 460 U.S. 1007 (1983).

2. This question presented is exceptionally important. *Timberlane*'s discretionary abstention doctrine is "cumbersome, often indeterminate, conducive to lengthy and expensive discovery, and thus extremely burdensome to both litigants and courts," and "largely inconsistent" with this Court's own approach in *Empagran*." Areeda & Hovenkamp ¶ 273, at 375. Antitrust class actions are generally lengthy and complex proceedings, and in such actions all parties benefit from clear *ex ante* rules. The existence of a boundless discretionary abstention doctrine that may be applied *sua sponte* at any time from motion to dismiss through appeal interferes with judicial economy and the intended efficiency benefits of multidistrict proceedings.

Review is particularly important given the potential for *Timberlane*'s discretionary test to supplant more precisely defined doctrines. *Timberlane*, as applied to antitrust claims like Petitioners', subsumes clearer defenses to Sherman Act liability such as the defense (also raised and litigated below) of foreign sovereign compulsion. *See, e.g.*, *O.N.E. Shipping Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987). That defense relieves a defendant of Sherman Act liability when it can prove, as a factual matter, that the foreign sovereign compelled the conduct at issue. *See Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law."); Areeda & Hovenkamp ¶ 274c. Given

the extensive factual record in this case indicating that Respondents were *not* so compelled, *e.g.*, App. 117a, and the jury's factual finding to that effect, App. 278a, the panel could not have ruled for Respondents on grounds of foreign sovereign compulsion. In sum, *Timberlane*'s unbounded discretion allowed the panel to hold that a foreign sovereign compelled Respondents' conduct without bothering to consider the requisite elements of the foreign sovereign compulsion defense.

The *Timberlane* test, as applied by the opinion below, threatens to replace more precisely-defined inquiries and creates virtually unbounded judicial discretion over the extraterritorial application of U.S. antitrust laws. *See, e.g.*, Areeda & Hovenkamp ¶ 273, at 367 ("Indeed, to the extent the federal antitrust laws represent the public economic policy of the United States, there may be little room for considerations of comity at all. Dismissals are rare when there is a substantial effect on American commerce and no act of state or foreign compulsion.") (footnote and emphasis omitted). This Court's decision in *Empagran* casts serious doubt on the propriety of the panel's approach. *Empagran*, 542 U.S. at 165. Review in this Court is warranted to ensure that the extraterritorial reach of U.S. antitrust laws remains a matter decided by statutory text, rather than case-by-case application of a discretionary ten-part test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 3, 2017

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 20, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 13-4791-cv

IN RE: VITAMIN C ANTITRUST LITIGATION;
ANIMAL SCIENCE PRODUCTS, INC.,
THE RANIS COMPANY, INC.,

Plaintiffs-Appellees,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD.,
NORTH CHINA PHARMACEUTICAL GROUP
CORPORATION,

Defendants-Appellants.

August Term 2014

Argued: January 29, 2015

Decided: September 20, 2016

Before: CABRANES, WESLEY, and HALL, Circuit Judges.

Appendix A

OPINION

Hall, *Circuit Judge*:

This appeal arises from a multi-district antitrust class action brought against Defendants-Appellants Hebei Welcome Pharmaceutical and North China Pharmaceutical Group Corporation, entities incorporated under the laws of China. Plaintiffs-Appellees, Animal Science Products, Inc. and The Ranis Company, Inc., U.S. vitamin C purchasers, allege that Defendants conspired to fix the price and supply of vitamin C sold to U.S. companies on the international market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. This appeal follows the district court's denial of Defendants' initial motion to dismiss, *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008) (Trager, *J.*), a subsequent denial of Defendants' motion for summary judgment, *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011) (Cogan, *J.*),[1] and, after a jury trial, entry of judgment awarding Plaintiffs approximately $147 million in damages and enjoining the Defendants from engaging in future anti-competitive behavior. For the reasons that follow, we hold that the district court erred in denying Defendants' motion to dismiss.[2]

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1. District Judge David D. Trager passed away in January 2011, at which point this case was reassigned to District Judge Brian M. Cogan.

2. Because we vacate the judgment and reverse the district court's denial of Defendants' motion to dismiss, we do not address the subsequent stages of this litigation nor the related arguments on appeal.

Appendix A

This case presents the question of what laws and standards control when U.S. antitrust laws are violated by foreign companies that claim to be acting at the express direction or mandate of a foreign government. Specifically, we address how a federal court should respond when a foreign government, through its official agencies, appears before that court and represents that it has compelled an action that resulted in the violation of U.S. antitrust laws. In so doing we balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders. When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.

Here, because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad, and because Defendants could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case. Thus, we **VACATE** the judgment, **REVERSE** the district court's order denying Defendants' motion to dismiss, and **REMAND** with instructions to dismiss Plaintiffs' complaint with prejudice.

Appendix A

BACKGROUND[3]

For more than half a century, China has been a leading producer and exporter of vitamin C. In the 1970s, as China began to transition from a centralized state-run command economy to a market economy, the Chinese Government began to implement various export controls in order to retain a competitive edge over other producers of vitamin C on the world market. In the intervening years, the Government continued to influence the market and develop policies to retain that competitive edge. In the 1990s, for example, as a result of a reduction in vitamin C prices, the Government facilitated industry-wide consolidation and implemented regulations to control the prices of vitamin C exports. By 2001, Chinese suppliers had captured 60% of the worldwide vitamin C market.

In 2005, various vitamin C purchasers in the United States, including Plaintiffs Animal Science Products, Inc. and The Ranis Company, filed numerous suits against Defendants, Chinese vitamin C manufacturer Hebei Welcome Pharmaceutical Co. and its holding company, North China Pharmaceutical Group Corporation. These

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3. We set forth here only those facts necessary to resolve the issues on appeal. Unless otherwise noted, the facts have been taken from the allegations in Plaintiffs' Second Amended Complaint, E.D.N.Y. Dkt. No. 1:06-md-1738, Doc. 179, which we accept as true for purposes of resolving a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 109 (2d Cir. 2011). For a more complete recitation of the facts, see the district court's November 6, 2008 Memorandum and Order. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

cases were transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. The Plaintiffs allege, *inter alia*, that in December 2001 Defendants and their co-conspirators established an illegal cartel with the "purpose and effect of fixing prices, controlling the support of vitamin C to be exported to the United States and worldwide, and committing unlawful practices designed to inflate the prices of vitamin C sold to plaintiffs and other purchasers in the United States and elsewhere." E.D.N.Y. Dkt. No. 1:06-md-1738, Doc. 179 (Second Amended Complaint ("SAC")) ¶ 1. Specifically, Plaintiffs assert that Defendants colluded with an entity that has been referred to in this litigation as both the "Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China" and the "China Chamber of Commerce of Medicines & Health Products Importers & Exporters," (the "Chamber")[4] and agreed to "restrict their exports of Vitamin C in order to create a shortage of supply in the international market." *Id.* ¶ 49. Plaintiffs allege that, from December 2001 to the time the complaint was filed, Defendants, their representatives, and the Chamber devised and implemented policies to address price cutting by market actors and to limit production levels and increase vitamin C prices with the intent to create a shortage on the world market and maintain China's position as a leading exporter. *Id.* ¶ 60.

4. The parties explicitly disagree over the nature and authority of this entity. Plaintiffs characterize this entity as an "association" much like a trade association in the United States, while Defendants describe this entity as a government-controlled "Chamber" of producers, unique to China's state-controlled regulatory regime.

Rather than deny the Plaintiffs' allegations, Defendants instead moved to dismiss on the basis that they acted pursuant to Chinese regulations regarding vitamin C export pricing and were, in essence, required by the Chinese Government, specifically the Ministry of Commerce of the People's Republic of China (the "Ministry"), to coordinate prices and create a supply shortage. Defendants argued that the district court should dismiss the complaint pursuant to the act of state doctrine, the doctrine of foreign sovereign compulsion, and/or principles of international comity. In an historic act, the Ministry filed an *amicus curiae* brief in support of Defendants' motion to dismiss.[5]

In its brief to the district court, the Ministry represented that it is the highest authority within the Chinese Government authorized to regulate foreign trade. The Ministry explained that the Chamber, which Plaintiffs refer to as an "association," is entirely unlike a "trade association" or the "chamber of commerce" in the United States and, consistent with China's state-run economy, is a "Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels." Joint App'x at 153. The Ministry's *amicus* brief describes the Chamber as follows:

> To meet the need of building the *socialist market economy* and *deepening the reform*

5. As Judge Trager noted, the Ministry's appearance in this case is historic because it is the first time any entity of the Chinese Government has appeared *amicus curiae* before any U.S. court. On appeal, the Ministry also appears *amicus curiae* before this Court.

of foreign economic and trade management system, the China Chamber of Commerce of Medicines & Health Products Importers & Exporters was established in May 1989 in an effort to boost the sound development of foreign trade in medicinal products. As a social body formed along business lines and enjoying the status of legal person, the Chamber is composed of economic entities registered in the People's Republic of China dealing in medicinal items as authorized by the departments under the [S]tate Council responsible for foreign economic relations and trade as well as organizations empowered by them. *It is designated to coordinate import and export business* in *Chinese and Western medicines* and provide service for its member enterprises. Its over 1100 members are scattered all over China. The Chamber abides by the state laws and administrative statutes, *implements its policies and regulations governing foreign trade, accepts the guidance and supervision of the responsible departments under the States Council. The very purpose is to coordinate and supervise the import and export operations in this business, to maintain business order and protect fair competition, to safeguard the legitimate rights and interests of the state, the trade and the members and to promote the sound development of foreign trade in medicinal items.*

Joint App'x at 157 n.10 (emphasis in original). According to the Ministry, the Chamber was an instrumentality of the State that was required to implement the Ministry's administrative rules and regulations with respect to the vitamin C trade.[6]

In support of Defendants' motion to dismiss, the Ministry also provided evidence of two Ministry-backed efforts by the Chamber to regulate the vitamin C industry: (1) a vitamin C Subcommittee ("the Subcommittee") created in 1997 and (2) a "price verification and chop" policy ("PVC") implemented in 2002. The Chamber created the Subcommittee to address "intense competition and challenges from the international [vitamin C] market." Joint App'x at 159. Before 2002, only companies that were members of the Subcommittee were allowed to export vitamin C. Under this regime, a vitamin C manufacturer qualified for the Subcommittee and was granted an "export quota license" if its export price and volume was in compliance with the Subcommittee's coordinated export price and export quota. In short, the Ministry explained to the district court that it compelled the Subcommittee and its licensed members to set and coordinate vitamin C prices and export volumes.

In 2002, the Chamber abandoned the "export quota license" regime and implemented the PVC system, which

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6. In an annex to its brief to the district court, the Ministry provided the Mitnick Declaration, which contained a copy of all regulations cited by the Ministry. The Ministry noted that all documents were properly authenticated consistent with Rule 902(3) of the Federal Rules of Evidence, which governs the self-authentication of foreign documents.

the Ministry represented was in place during the time of the antitrust violations alleged in this case. To announce the new regime, the Ministry issued an official notice, a copy of which is attached to the Ministry's brief in support of Defendants' motion to dismiss. This document, hereinafter "the 2002 Notice," explains that the Ministry adopted the PVC regime, among other reasons, "in order to accommodate the new situations since China's entry into [the World Trade Organization], maintain the *order* of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports." Special App'x at 301. The 2002 Notice, furthermore, refers to "industry-wide negotiated prices" and states that "PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline." Special App'x at 302. According to the Ministry, under this system, vitamin C manufacturers were required to submit documentation to the Chamber indicating both the amount and price of vitamin C it intended to export. The Chamber would then "verify" the contract price and affix a "chop," i.e., a special seal, to the contract, which signaled that the contract had been reviewed and approved by the Chamber. A contract received a chop only if the price of the contract was "at or above the minimum acceptable price set by coordination through the Chamber." Joint App'x at 164. Manufacturers could only export vitamin C if their contracts contained this seal. The Ministry asserted that under the PVC regime, Defendants were required to coordinate with other vitamin C manufacturers and agree on the price that

the Chamber would use in the PVC regime. In short, the Ministry represented to the district court that all of the vitamin C that was legally exported during the relevant time was required to be sold at industry-wide coordinated prices.

Defendants moved to dismiss the complaint based on the act of state doctrine, the defense of foreign sovereign compulsion, and the principle of international comity. The district court (Trager, *J.*) denied the motion in order to allow for further discovery with respect to whether Defendants' assertion that the actions constituting the basis of the antitrust violations were compelled by the Chinese Government. In the district court's view, the factual record was "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559.

After further discovery, Defendants moved for summary judgment asserting the same three defenses that were the basis for their motion to dismiss. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 525-26. The district court (Cogan, *J.*) considered the evidence submitted by Defendants and the Ministry and accepted the Ministry's explanation as to its relationship with the Chamber, but "decline[d] to defer to the Ministry's interpretation of Chinese law" because the Ministry failed "to address critical provisions" of the PVC regime that "undermine[d] [the Ministry's] interpretation of Chinese law." *Id.* at 551. The district court further reasoned that pursuant to Federal Rule of Civil Procedure 44.1 ("Rule

44.1"), when interpreting Chinese law it had "substantial discretion to consider different types of evidence" beyond the Ministry's official statements, including, for example, the testimony of Plaintiffs' expert witness, a scholar of Chinese law. *Id.* at 561. The district court denied Defendants' motion for summary judgment because it determined that "Chinese law did not compel Defendants' anticompetitive conduct" in any of the relevant time periods. *Id.* at 567.

The case ultimately went to trial. In March 2013, a jury found Defendants liable for violations of Section 1 of the Sherman Act. The district court awarded Plaintiffs approximately $147 million in damages and issued a permanent injunction barring Defendants from further violating the Sherman Act. This appeal followed.

DISCUSSION

The central issue that we address is whether principles of international comity required the district court to dismiss the suit. As part of our comity analysis we must determine whether Chinese law required Defendants to engage in anticompetitive conduct that violated U.S. antitrust laws. Within that inquiry, we examine the appropriate level of deference to be afforded a foreign sovereign's interpretation of its own laws. We hold that the district court abused its discretion by not abstaining, on international comity grounds, from asserting jurisdiction because the court erred by concluding that Chinese law did not require Defendants to violate U.S. antitrust law and further erred by not extending adequate deference

to the Chinese Government's proffer of the interpretation of its own laws.

A. Standard of Review

We review for abuse of discretion a district court's denial of a motion to dismiss on international comity grounds. *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 422 (2d Cir. 2005). An abuse of discretion "occurs when (1) the court's decision rests on an error of law or clearly erroneous factual finding, or (2) its decision cannot be located within the range of permissible decisions." *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 104 (2d Cir. 2016) (alterations and internal quotation omitted). The determination of foreign law is "a question of law, which is subject to *de novo* review." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 80 (2d Cir. 2002) (internal quotation omitted). In determining foreign law, "we may consider any relevant material or source, including the legal authorities supplied by the parties on appeal as well as those authorities presented to the district court below." *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604 (2d Cir. 1999); *see* Fed. R. Civ. P. 44.1.

B. International Comity

Defendants argue that the district court erred by not dismissing Plaintiffs' complaint on international comity grounds. Comity is both a principle guiding relations between foreign governments and a legal doctrine by

which U.S. courts recognize an individual's acts under foreign law. *See In re Maxwell Commun. Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996). "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (internal quotations omitted). "[I]t is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* This doctrine "is not just a vague political concern favoring international cooperation when it is in our interest to do so [but r]ather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.*, 482 U.S. 522, 555, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987). While we approach Defendants' international comity defense from the "legal sense," we do not lose sight of the broader principles underlying the doctrine. *See JP Morgan Chase Bank*, 412 F.3d at 423 ("Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards." (internal quotation omitted)). Our analysis reflects an obligation to balance "the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell Commun. Corp*, 93 F.3d at 1048.

The principles of comity implicate a federal court's exercise of jurisdiction. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987). Defendants do not dispute that the district court had subject matter jurisdiction over Plaintiffs' claims, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993) (collecting cases) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); rather, Defendants argue that principles of international comity required the district court to abstain from exercising that jurisdiction here, *see O.N.E. Shipping Ltd.*, 830 F.2d at [illegible] ("Congress left it to the courts to decide when to employ notions of abstention from exercising jurisdiction in extraterritorial antitrust cases."); *see also* H.R. Rep. No. 97-686, at 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the Foreign Trade Antitrust Improvements Act[7] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction.").

To determine whether to abstain from asserting jurisdiction on comity grounds we apply the multi-factor

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7. "Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless 'such conduct has a direct, substantial, and reasonably foreseeable effect' on domestic or import commerce." *Hartford Fire*, 509 U.S. at 796 (quoting 15 U.S.C. § 6a(1)(A)) (internal citations omitted).

balancing test set out in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). *See O.N.E. Shipping Ltd.*, 830 F.2d at 451-52 (noting that "[t]he comity balancing test has been explicitly used in this Court"). Both *Timberlane Lumber* and *Mannington Mills* addressed the unique international concerns that are implicated by exercising jurisdiction over antitrust violations that occur abroad and that involve the laws and regulations of a foreign nation. *See Timberlane Lumber Co.*, 549 F.2d at 613 ("[T]here is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."); *Mannington Mills, Inc.*, 595 F.2d at 1296 ("When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."). Combined and summarized here, the enumerated factors from *Timberlane Lumber* and *Mannington Mills* (collectively the "comity balancing test") guiding our analysis of whether to dismiss on international comity grounds include: (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad

and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue. *Mannington Mills, Inc.*, 595 F.2d at 1297-98; *Timberlane Lumber Co.*, 549 F.2d at 614.

Since our adoption of the comity balancing test, the Supreme Court, in determining whether international comity cautioned against exercising jurisdiction over antitrust claims premised entirely on foreign conduct, relied solely upon the first factor—the degree of conflict between U.S. and foreign law—to decide that abstention was inappropriate. *Hartford Fire*, 509 U.S. at 798 ("The only substantial question in this litigation is whether there is in fact a true conflict between domestic and foreign law." (internal quotation omitted)). The Court explained that just because "conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws." *Id.* Thus, in that case, the degree of conflict between the laws of the two states had to rise to the level of a true conflict, i.e. "compliance with the laws of both countries [must have been] impossible," to justify the Court's abstention on comity grounds. *Id.* at 799.

In other words, "[n]o conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* (quoting Restatement (Third) of Foreign Relations Law § 403, cmt. e). After determining that there was not a true conflict, the Court reflected that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the ground of international comity." *Id.*

We read *Hartford Fire* narrowly and interpret the modifying phrase "in this litigation" in reference to the "other considerations that might inform a decision" as suggesting that the remaining factors in the comity balancing test are still relevant to an abstention analysis. *Id.*; *see Mujica v. AirScan Inc.*, 771 F.3d 580, 600 (9th Cir. 2014) ("Since the majority did not address the 'other considerations' bearing on comity, the Court's *Hartford Fire* analysis 'left unclear whether it was saying that the only relevant comity factor *in that case* was conflict with foreign law . . . or whether the Court was more broadly rejecting balancing of comity interests in *any* case where there is no true conflict.'" (quoting Harold Hongju Koh, *Transnational Litigation in United States Courts* 80 (2008)). That a true conflict was lacking in *Hartford Fire* does not, in the inverse, lead us to conclude that the presence of such a conflict alone is sufficient to require dismissal and thereby vitiate the need to consider the remaining factors.

Some courts, after *Hartford Fire*, have gone further and do not require a true conflict between laws before applying the remaining factors in the comity balancing

test. *See, e.g., Mujica*, 771 F.3d at 600 ("We think that *Hartford Fire* does *not* require proof of a 'true conflict' as a prerequisite for invoking the doctrine of comity, at least in a case involving adjudicatory comity."); *Freund v. Rep. of Fr.*, 592 F. Supp. 2d 540, 574 (S.D.N.Y. 2008) ("In post-*Hartford Fire* cases, conflict analysis has not been rigidly invoked to preclude consideration of the full range of principles relating to international comity." (citation omitted)). Similarly, we have not required a true conflict where a party does not invoke a prescriptive comity defense, "that is, where a party [does not] claim[] that it is subject to conflicting regulatory schemes," as Defendants do here. *Mujica*, 771 F.3d at 600; *see Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) ("[T]he only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend 'amicable working relationships' with Egypt." (citation omitted)). We need not, however, determine whether absent a true conflict, the district court could have abstained from asserting jurisdiction on comity grounds because, in our view and as explained below, there is a true conflict between U.S. law and Chinese law in this case.

C. True Conflict Analysis

To determine whether Defendants could have sold and distributed vitamin C while in compliance with both Chinese and U.S. law, and thus whether a "true conflict" exists, we must determine conclusively what the law of each country requires.

Appendix A

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. While this language has been interpreted to outlaw only unreasonable restraints in trade, *see, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997), certain types of anticompetitive conduct are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). "Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). Thus, if Chinese law required Defendants to enter into horizontal price-fixing agreements, "compliance with the laws of both countries is [] impossible," *Hartford Fire*, 509 U.S. at 799, and there is a true conflict.

The Ministry, as *amicus*, has proclaimed on behalf of the Chinese Government that Chinese law, specifically the PVC regime during the relevant period, required Defendants, as manufacturers of vitamin C, to fix the price and quantity of vitamin C sold abroad. The Ministry mainly relies on the reference to "industry-wide negotiated prices" contained in the 2002 Notice to support its position. Plaintiffs, however, argue that the Ministry's statements are not conclusive and that because the 2002 Notice does not explicitly mandate price fixing, adherence to both Chinese law and U.S. antitrust law is possible. Our

interpretation of the record as to Chinese law thus hinges on the amount of deference that we extend to the Chinese Government's explanation of its own laws.

1. Standard of Deference

There is competing authority on the level of deference owed by U.S. courts to a foreign government's official statement regarding its own laws and regulations. In the seminal case *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942), the Supreme Court considered, *inter alia*, the extraterritorial reach of a 1918 decree nationalizing Russia's insurance business. The record before the *Pink* Court included expert testimony and "voluminous" other evidence bearing on the proper interpretation of the 1918 decree and its extraterritorial effect. *Id.* at 218. This evidence included an official declaration of the Russian Government explaining the intended extraterritorial effect of the decree. *See id.* at 219-20. The Court "d[id] not stop to review" the whole body of evidence, however, *id.* at 218, because it determined that the official declaration was "conclusive" as to the extraterritorial effect of the decree, *id.* at 220.

Since 1942, several courts have cited *Pink* for the proposition that an official statement or declaration from a foreign government clarifying its laws must be accepted as "conclusive." *See, e.g., D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1284 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977) ("The principle of *Pink* requires this Court to accept the opinion of the attorney general of Mexico as an official declaration by that government that the effect

of the expropriation decree was to extinguish Papantla's royalty and participating rights in the expropriated oil."); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1363 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) (accepting as conclusive an opinion issued by the Department of Justice of the Republic of the Philippines and presented to the court articulating the scope and effect of a law of the Philippines); *but see Access Telecom, Inc. v. MCI Telecomms. Corp*, 197 F.3d 694, 714 (5th Cir. 1999), *cert. denied*, 531 U.S. 917, 121 S. Ct. 275, 148 L. Ed. 2d 200 (2000) (holding, without citation to *Pink*, that "[t]he fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court.").

Other courts, however, have intimated that while the official statements of a foreign government interpreting its laws are entitled to deference, U.S. courts need not accept such statements as conclusive. For example, in *Amoco Cadiz*, presented with conflicting interpretations of a French law, the Seventh Circuit held that "[a] court of the United States owes substantial deference to the construction France places upon its domestic law. . . . Giving the conclusions of a sovereign nation less respect than those of [a United States] administrative agency is unacceptable." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (internal citations omitted).

Appendix A

The district court below, at the motion to dismiss stage, relied on three authorities—Rule 44.1, *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142 (2d Cir. 2008), and *Karaha Bodas Co.*, 313 F.3d 70—for the proposition that the Second Circuit, in particular, has "adopted a softer view toward the submissions of foreign governments." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 557. We disagree with this conclusion.

Contrary to the district court's reasoning, we find no support for the argument that Rule 44.1, adopted in 1966 long after *Pink* was decided, modified the level of deference that a U.S. court must extend to a foreign government's interpretation of its own laws. Rule 44.1 provides that, when determining foreign law, a court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. According to the advisory committee notes, the rule has two purposes: (1) to make a court's determination of foreign law a matter of law rather than fact, and (2) to relax the evidentiary standard and to create a uniform procedure for interpreting foreign law. Fed. R. Civ. P. 44.1 advisory committee's notes to 1966 adoption. The advisory committee notes suggest that Rule 44.1 was meant to address some of the challenges facing litigants whose claims and defenses depended upon foreign law and to provide courts with a greater array of tools for understanding and interpreting those laws. *Id.* Rule 44.1 explicitly focuses on *what* a court may consider when determining foreign law, but it is silent as to *how* a court should analyze the relevant material or sources. Thus,

courts must still evaluate the relevant source material within the context of each case. *See, e.g., Curley v. AMR Corp.*, 153 F.3d 5, 14-15 (2d Cir. 1998) (explaining that because "Mexican law is much different" than New York state law and "its sources do not lie in precedent cases" the court must "consider the text of the constitution, civil code and statutory provisions . . . and give them preponderant consideration" when analyzing Mexican law). Finding no authority to the contrary, we conclude that Rule 44.1 does not alter the legal standards by which courts analyze foreign law, and thus, the rule does not abrogate or "soften" the level of deference owed by U.S. courts to statements of foreign governments appearing in U.S. courts.

The district court looked to our decision in *Villegas Duran* to bolster its conclusion that this court has adopted a softer view toward submissions of foreign governments. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 557. In *Villegas Duran* we declined to credit an affidavit from the Chilean Government that clarified the appellant's child custody rights under Chilean law. 534 F.3d at 148 ("Reasons existed for the district court to refrain from giving the affidavit absolute deference."). We consider *Villegas Duran* inapplicable to the present case for two reasons. First, because the Chilean Government did not appear before the court in that case, either as a party or as an *amicus*, the level of deference the court afforded the Chilean affidavit does not guide our application here. Second, *Villegas Duran* was overturned by the Supreme Court, *Duran v. Beaumont*, 560 U.S. 921, 130 S. Ct. 3318, 176 L. Ed. 2d 1216 (2010), in light of *Abbott v. Abbott*, 560

U.S. 1, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010). In *Abbott*, the Court analyzed the same Chilean custody law at issue in *Villegas Duran* but found the very same affidavit from the Chilean Government that was submitted in *Villegas Duran* "notable" in its analysis of Chilean law and adopted Chile's interpretation of that law. *Abbott*, 560 U.S. at 10-11 ("[I]t is notable that a Chilean agency has explained that [the Chilean law] is a 'right to authorize the minors' exit' from Chile and that this provision means that neither parent can 'unilaterally' 'establish the [child's] place of residence.'"(internal citation omitted)). To the extent that the majority's analysis in *Villegas Duran* suggests that a foreign sovereign's interpretation of its own laws warrants a lesser degree of deference, the Supreme Court's approach in interpreting Chilean law—relying, in part, on the Chilean Government's affidavit—requires us to question, if not reject, *Villegas Duran* as precedent bearing on that issue.

Finally, the district court also relied on our decision in *Karaha Bodas*, 313 F.3d 70, to support its conclusion. In that case, a judgment creditor of an oil and gas company owned and controlled by the Republic of Indonesia sought to execute upon funds held in New York trust accounts. *Id.* at 71. The Republic of Indonesia joined the appeal as a party with an affected interest, and in so doing, sought to clarify the applicable Indonesian law as well as the Indonesian Government's relationship with the gas company. *Id.* Citing to our sister circuits in *Amoco Cadiz* and *Access Telecom*, we credited the Republic of Indonesia's interpretation and explained that "a foreign sovereign's views regarding its own laws merit—although

they do not command—some degree of deference." *Id.* at 92. We clarified that, "where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.*

It is noteworthy that, while we suggested in *Karaha Bodas* that deference to a foreign sovereign's interpretation need not be "conclusive" in every case, we ultimately adopted the Republic of Indonesia's interpretation of its own regulation.[8] Indeed, we have yet to identify a case where a foreign sovereign appeared before a U.S. tribunal and the U.S. tribunal adopted a reading of that sovereign's laws contrary to that sovereign's interpretation of them.

Consistent with our holding in *Karaha Bodas* and the Supreme Court's pronouncements in *Pink*, we reaffirm the principle that when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements. If deference by any measure is to mean

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8. Although we adopted the Republic of Indonesia's "reading of the relevant Indonesian law," we declined to accept fully Indonesia's argument on appeal because it had "not identified any Indonesian statute or regulation" in support of its position. *Karaha Bodas*, 313 F.3d at 92. To the extent there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws, deference may be inappropriate.

anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system. *Cf. Abbott*, 560 U.S. at 20 ("Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration . . . ."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) (recognizing, among other things, that the "basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system" creates "disagreements as to [the] relevant international legal standards" such that inquiring into the validity of a foreign sovereign's actions is barred by the state action doctrine). Not extending deference in these circumstances disregards and unravels the tradition of according respect to a foreign government's explication of its own laws, the same respect and treatment that we would expect our government to receive in comparable matters before a foreign court. *Cf. Hilton v. Guyot*, 159 U.S. 113, 191, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (explaining that the rule of reciprocity should "work itself firmly into the structure of our international jurisprudence"); *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) ("The declaration of a United States court that the executive branch of the Russian government violated its own law . . . would be

an affront to the government of a foreign sovereign."); *Villegas Duran*, 534 F.3d at 153 (Wesley, *J.*, dissenting) (explaining that "this Court's practice of giving some deference to a foreign sovereign's view of its own law" and "careful attention" to the interpretation of foreign law is exactly what "we would expect . . . of a [foreign] court" in a reciprocal situation).

2. Applying Deference to the Ministry's Brief

The official statements of the Ministry should be credited and accorded deference. On that basis, we conclude, as Defendants and the Ministry proffer, that Chinese law required Defendants to engage in activities in China that constituted antitrust violations here in the United States.

The 2002 Notice, *inter alia*, demonstrates that from 2002 to 2005, the relevant time period alleged in the complaint, Chinese law required Defendants to participate in the PVC regime in order to export vitamin C. This regulatory regime allowed vitamin C manufacturers the export only of vitamin C subject to contracts that complied with the "industry-wide negotiated" price. Although the 2002 Notice does not specify how the "industry-wide negotiated" price was set, we defer to the Ministry's reasonable interpretation that the term means what it suggests—that members of the regulated industry were required to negotiate and agree upon a price. It would be nonsensical to incorporate into a government policy the concept of an "industry-wide negotiated" price and require vitamin C manufacturers to comply with that

minimum price point if there were no directive to agree upon such a price. Moreover, while on their face the terms "industry self-discipline," "coordination," and "voluntary restraint" may suggest that the Defendants were not required to agree to "industry-wide negotiated" prices, we defer to the Ministry's reasonable explanation that these are terms of art within Chinese law connoting the government's expectation that private actors actively self-regulate to achieve the government's policy goals in order to minimize the need for the government to resort to stronger enforcement methods.[9] In this context, we find it reasonable to view the entire PVC regime as a decentralized means by which the Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed upon price as the minimum export price. In short, by directing vitamin C manufacturers to coordinate export prices and quantities and adopting those standards into the regulatory regime, the Chinese Government required Defendants to violate the Sherman Act. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) ("[I]t is [] well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring.").

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9. Similarly, while the documentary evidence shows that when China transitioned from the export quota regime to the PVC regime the role of the Subcommittee within China's regulatory framework changed from a governmental group whose membership was mandatory to a non-governmental trade organization whose membership was voluntary, we again defer to the Ministry's reasonable interpretation that the PVC regime required industry-wide coordination of prices regardless of whether membership in the Subcommittee was required.

We reiterate that deference in this case is particularly important because of the unique and complex nature of the Chinese legal- and economic-regulatory system and the stark differences between the Chinese system and ours. As the district court recognized, "Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559. China's legal system is distinct from ours in that "[r]ather than codifying its statutes, the Chinese government [] frequently governs by regulations promulgated by various ministries . . . . [and] private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents." *Id.* Moreover, the danger that "an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law" is all the more plausible where the documents the district court relied upon are translations and use terms of art which are unique to the Chinese system. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 542. Deferring to the Ministry's explanation of what is legally required under its system is all the more important where, as here, the record evidence shows a clear disparity between China's economic regulatory regime and our own.

Instead of viewing the ambiguity surrounding China's laws as a reason to defer to the Ministry's reasonable interpretation, the district court, recognizing generally the unique features of China's system, attempted to parse out Defendants' precise legal role within China's complex

vitamin C market regulatory framework.[10] Noting the discrepancies between China's interpretations of its laws and Plaintiffs' contrary reading of the underlying regulations, the district court determined that, because "[i]t is not clear from the record at this stage of the case whether defendants were performing [a] government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens[,]" further inquiry into the voluntariness of Defendants' actions was warranted. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559. Specifically, the district court found problematic the possibility that the "defendants [made] their own choices and then ask[ed] for the government's imprimatur." *Id.*

The problems with the district court's approach were threefold. First, it determined that whether Chinese law compelled Defendants' anticompetitive conduct depended in part on whether Defendants petitioned the Chinese Government to approve and sanction such conduct. Second, it relied on evidence that China's price-fixing laws were not enforced to conclude that China's price fixing laws did not exist. And third, it determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict.

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10. We note that if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate.

Whether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant to whether Chinese law actually required Defendants to act in a way that violated U.S. antitrust laws.[11] Moreover, inquiring into the motives behind the Chinese Government's decision to regulate the vitamin C market in the way it did is barred by the act of state doctrine. "In essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." *O.N.E. Shipping Ltd.*, 830 F.2d at 452. The act of state doctrine precludes us from discrediting the Subcommittee or the PVC process as ad hoc protectionist regimes that were intended to provide governmental sanction to an otherwise privately formed cartel. By focusing on the Defendants' role in the regulatory regime, as opposed to the regime itself, the district court erroneously required Defendants to show that the government essentially forced Defendants to price-fix against their will in order to show that there was a true conflict between U.S. antitrust law and Chinese law. This demands too much. It is enough that Chinese law actually mandated such action, regardless of whether Defendants benefited from, complied with, or orchestrated the mandate. Thus, we decline to analyze why China regulated vitamin C in the manner it did and instead focus on what Chinese law required. *See id.* at 453.

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11. To use a domestic example, it would be equally inappropriate for a U.S. court, when analyzing U.S. insurance law, to inquire into the lobbying efforts of U.S. insurance companies for the purposes of determining whether U.S. insurance law applied to those companies.

Similarly, inquiring into whether the Chinese Government actually enforced the PVC regime as applied to vitamin C exports confuses the question of what Chinese law required with whether the vitamin C regulations were enforced.[12] Plaintiffs argue that because there was extensive evidence that Defendants exported vitamin C without first obtaining the required chop and that Defendants sold vitamin C below the government floor price of $3.35/kg, the Chinese Government did not actually require compliance with the PVC regime. We are disinclined to view this factual evidence of China's unwillingness or inability to enforce the PVC regime as relevant to the PVC regime's legal mandate.

Finally, the district court made a conceptual error about the potential difference between foreign compulsion and a true conflict. The district court credited Plaintiffs' argument that because there was evidence that Defendants routinely agreed to export vitamin C at a price well above the agreed upon price of $3.35/kg, the Defendants alleged anticompetitive conduct was not compelled. But this conclusion misses the mark. Even if Defendants' specific conduct was not compelled by the 2002 Notice, that type of compulsion is not required for us to find a true conflict between the laws of the two sovereigns. It is sufficient "if compliance with the laws of both countries is impossible." *Hartford Fire*, 509 U.S.

12. To use another domestic example, it would be inappropriate for a U.S. court, when analyzing whether U.S. labor laws required factory workers to wear safety masks, to examine evidence of how often factory owners were punished for such violations or how many factory owners actually complied with the safety mask regulations.

at 799. Whether Defendants, in fact, charged prices in excess of those mandated by the 2002 Notice does not weigh heavily into our consideration of whether the PVC regime, on its face, required Defendants to violate U.S. antitrust laws in the first instance.

Because we hold that Defendants could not comply with both U.S. antitrust laws and Chinese law regulating the foreign export of vitamin C, a true conflict exists between the applicable laws of China and those of the United States.

D. Applying the Remaining Comity Factors

Having determined that Chinese law required Defendants to violate U.S. antitrust law, we now consider whether the remaining factors weigh in favor of dismissal based on principles of international comity. The district court, both at the motion to dismiss and the summary judgment stages, did not apply the remaining factors because it determined that Chinese law did not require price fixing. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 559; *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 525-26. We need not remand the case to the district court for consideration of these factors in the first instance because the factors clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction. *See, e.g., Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 (2d Cir. 2013) (while "[i]t is ordinarily appropriate for us to vacate the judgment of a district court and remand the" case, "where a record is fully developed and it discloses that, in our judgment, only one possible resolution" of the

remaining issue would be permissible "there is no reason to remand").

The remaining factors in the comity balancing test are: (1) nationality of the parties, locations or principal places of business of corporations; (2) relative importance of the alleged violation of conduct here compared to that abroad; (3) the extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (4) existence of intent to harm or affect American commerce and its foreseeability; (5) possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (6) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (7) whether the court can make its order effective; (8) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (9) whether a treaty with the affected nations has addressed the issue. *Mannington Mills, Inc.*, 595 F.2d at 1297-98; *Timberlane Lumber Co.*, 549 F.2d at 614. Applying the test here, we hold that these remaining factors decidedly weigh in favor of dismissal and counsel against exercising jurisdiction in this case.

All Defendants are Chinese vitamin C manufacturers with their principle places of business in China, and all the relevant conduct at issue took place entirely in China. Although Plaintiffs may be unable to obtain a remedy for Sherman Act violations in another forum, complaints as to China's export policies can adequately be addressed

through diplomatic channels and the World Trade Organization's processes. Both the U.S. and China are members of the World Trade Organization and are subject to the same rules on export restrictions. Moreover, there is no evidence that Defendants acted with the express purpose or intent to affect U.S. commerce or harm U.S. businesses in particular. Rather, according to the Ministry, the regulations at issue governing Defendants' conduct were intended to assist China in its transition from a state-run command economy to a market-driven economy, and the resulting price-fixing was intended to ensure China remained a competitive participant in the global vitamin C market and to prevent harm to China's trade relations. While it was reasonably foreseeable that China's vitamin C policies would generally have a negative effect on Plaintiffs as participants in the international market for vitamin C, as noted above, there is no evidence that Defendants' antitrust activities were specifically directed at Plaintiffs or other U.S. companies.

Furthermore, according to the Ministry, the exercise of jurisdiction by the district court has already negatively affected U.S.-China relations. *See* Joint App'x at 1666, U.S. Vitamin Fine "unfair and inappropriate" Says Mofcom, Global Competition Review, Katy Oglethorpe, March 21, 2013 (quoting the Chinese government as stating that the district court's judgment "will cause problems for the international community and international enterprises, and will eventually harm the interests of the United States due to the increase in international disputes"). The Chinese Government has repeatedly made known to the federal courts, as well as to the United States Department

of State in an official diplomatic communication relating to this case, that it considers the lack of deference it received in our courts, and the exercise of jurisdiction over this suit, to be disrespectful and that it "has attached great importance to this case."[13] Doc. No. 111, Diplomatic Correspondence between Embassy for the People's Republic of China and the United States Department of State, April 9, 2014; *cf. Société Nationale Industrielle Aérospatiale*, 482 U.S. at 546 ("[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a *coordinate interest* in the litigation." (emphasis added)).

Currently, the district court's judgment orders Defendants to comply with conflicting legal requirements. This is an untenable outcome. It is unlikely, moreover, that the injunctive relief the Plaintiffs obtained would be enforceable in China. If a similar injunction were issued in China against a U.S. company, prohibiting that company from abiding by U.S. economic regulations, we would undoubtedly decline to enforce that order. *See Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 2016 U.S. App. LEXIS 13991, 2016 WL 4087215 (2d Cir. 2016) ("[A] final judgment obtained through sound procedures in a foreign country is generally conclusive . . .

13. We take judicial notice of the diplomatic communication from the Embassy of the People's Republic of China to the United States State Department dated April 9, 2014. *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe*, 566 F.2d 861, 862 (2d Cir. 1977). The Ministry's motion as to the diplomatic communication is denied as moot.

unless . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought." (internal quotation omitted)).

Simply put, the factors weigh in favor of abstention. Recognizing China's strong interest in its protectionist economic policies and given the direct conflict between Chinese policy and our antitrust laws, we conclude that China's "interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law." *O.N.E. Shipping Ltd.*, 830 F.2d at 450. Accordingly, we hold that the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction, and we reverse the district court's order denying Defendants' motion to dismiss.[14]

We further note that while we abstain from adjudicating Plaintiffs' claims with respect to the Defendants' conduct, the Plaintiffs are not without recourse to the executive branch, which is best suited to deal with foreign policy, sanctions, treaties, and bi-lateral negotiations. Because we reverse and remand for dismissal on the basis of international comity, we do not address the act of state,

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14. We note that it may not be reasonable in all cases to abstain on comity grounds from asserting jurisdiction at the motion to dismiss stage and that a trial court may need the opportunity to consider the countervailing interests and policies on the record that follows discovery. In this case, however, dismissal is appropriate because, after limited discovery, the record before the court at the motion to dismiss stage was sufficient to determine what Chinese law required and whether abstention was appropriate.

foreign sovereign compulsion, or political question defenses.

CONCLUSION

According appropriate deference to the Ministry's official statements to the district court and to this Court on appeal, we hold that Defendants were required by Chinese law to set prices and reduce quantities of vitamin C sold abroad and doing so posed a true conflict between China's regulatory scheme and U.S. antitrust laws such that this conflict in Defendants' legal obligations, balanced with other factors, mandates dismissal of Plaintiffs' suit on international comity grounds. Accordingly, we **VACATE** the district court's judgment entered November 27, 2013, **REVERSE** the order of November 11, 2008, denying Defendants' motion to dismiss, and **REMAND** with instructions to dismiss Plaintiffs' complaint with prejudice.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED NOVEMBER 26, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC) (JO); 05-CV-0453

IN RE VITAMIN C ANTITRUST LITIGATION.

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Plaintiffs,

v.

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

November 25, 2013, Decided
November 26, 2013, Filed

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

On March 14, 2013, a jury reached found defendants Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei") and North China Pharmaceutical Group Corp. ("NCPGC")[1]

1. All other defendants in this action settled either prior to or during trial. The jury's verdict only addressed the liability of Hebei and NCPGC.

liable to plaintiffs[2] for violating the Sherman Act. Currently before the Court are two post-trial motions. First, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, defendants have renewed their motion for judgment as a matter of law on three grounds. Second, the Injunction Class has moved for an order permanently enjoining defendants from entering into any agreements to fix the price or limit the supply of vitamin C. Familiarity with the facts and procedural history of this action is presumed. For the reasons set forth below, defendants' motion is denied and the Injunction Class's motion is granted.

I. Defendants' Renewed Motion for Judgment as a Matter of Law

In order to succeed on their renewed motion for judgment as a matter of law, defendants must bear "a heavy burden." *Cash v. Cnty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011). A movant can be "awarded judgment as a matter of law only when 'a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Id.* (quoting Fed. R. Civ. P. 50(a)(1)). "[T]he district court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007) (internal quotations and alterations omitted).

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2. The Court certified two plaintiff classes in this action, the Director Purchaser Damages Class and the Injunction Class.

Therefore, where, as here, a "jury has deliberated in the case and actually returned its verdict," the "court may set aside the verdict only if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it." *Cash*, 654 F.3d at 333 (internal quotation marks omitted). Here, defendants have sought judgment as a matter of law on three grounds. I will address each ground in turn.

A. Act of State, Foreign Sovereign Compulsion, and International Comity

First, defendants argue that the jury's verdict against them is barred as a matter of law by the doctrines of act of state, foreign sovereign compulsion, and international comity.[3] In essence, defendants contend that the Court's prior rulings that Chinese law did not compel defendants' actions were erroneous and that plaintiffs' claims never should have been brought before a jury. Alternatively, defendants argue that even if it was proper to submit this matter to a jury, the trial was "fatally flawed" by my decision to exclude from the jury copies of Chinese laws and regulations and witness testimony about the meaning and content of those laws. The Court stands by and reaffirms its prior rulings that Chinese law did not

3. Defendants previously raised these arguments in a motion to dismiss, which was denied by the late Judge Trager, and in a motion for summary judgment, or, alternatively, a motion for a determination of foreign law under Fed. R. Civ. P. 44.1, which I denied.

compel defendants to engage in antitrust violations, that the doctrines of act of state and international comity do not bar plaintiffs' suit, and that it was inappropriate to present evidence about the meaning of Chinese laws to the jury. Nothing has changed from these pretrial rulings and defendants have stated no additional grounds to revisit them.

Moreover, defendants ignore that one purpose of the trial in this matter was to determine whether, regardless of what Chinese law authorized, defendants' conduct was actually compelled by the Chinese government as a matter of a fact.[4] Therefore, the Court instructed the jury that it was required to return a defense verdict if defendants proved, by a preponderance of the evidence, that the Chinese government actually compelled them to fix the price or limit the supply of vitamin C and defendants have not challenged this instruction.

There was ample evidence presented at trial from which the jury could have found that the Chinese government did not actually compel defendants' decisions to fix the price and limit the supply of vitamin C — including evidence suggesting that the "verification and chop" mechanism did not actually compel defendants to enter into anticompetitive agreements and that the Vitamin C Subcommittee of the Chamber of Commerce of

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4. The need for a jury to determine whether factual compulsion became even clearer during the trial when several witnesses testified that contemporaneous documents offered as evidence on the compulsion issue — including memoranda addressed to China's Ministry of Commerce — were inaccurate.

Medicines and Health Products Importers and Exporters (the "Chamber") was a voluntary trade association. Moreover, in rejecting the compulsion defense, the jury necessarily assessed the credibility of witnesses' testimony and, on a Rule 50(b) motion, the Court may not second-guess those determinations. *See Zellner*, 494 F.3d at 370. Chinese laws themselves were not placed on trial. Rather, the jury was only required to determine whether the Chinese government acted, not the propriety of its actions.

Nor, despite defendants' suggestion, was it error for the Court to exclude from the jury copies of Chinese laws and regulations and witness testimony about the meaning and content of those laws.[5] Pursuant to Fed. R. Civ. P. 44.1, the determination of foreign law is a question of law. It is for the Court, not for the jury, to decide questions of law and the Court did so when it ruled that, as a matter of law, Chinese law did not compel defendants' conduct. Accordingly, defendants' renewed motion for judgment as a matter of law based on the act of state, foreign sovereign compulsion, and international comity doctrines is denied.

B. NCPGC's Liability

Second, NCPGC seeks judgment as a matter of law dismissing plaintiffs' claims and vacating the jury's verdict against it on the ground that there was insufficient evidence for the jury to find that NCPGC

5. Defendants have not sought a new trial because of the Court's exclusion of this supposed evidence.

was a member of the anticompetitive conspiracy at issue. NCPGC contends that the overwhelming weight of the evidence demonstrates that it was Hebei, its indirect subsidiary, which participated in the Chamber's vitamin C subcommittee meetings and entered into the relevant agreements, not NCPGC. It points to numerous memoranda summarizing meetings of the Vitamin C Subcommittee which provide no evidence that any NCPGC agents entered into anticompetitive agreements on behalf of NCPGC and it characterizes the evidence on which plaintiffs rely as "limited" and "marginal."

I previously expressed my doubts concerning the sufficiency of plaintiffs' proof of NCPGC's participation in the conspiracy in the context of defendants' Rule 50(a) motion, but nonetheless denied the motion. Although the evidence adduced by plaintiffs on this issue is hardly overpowering, I cannot conclude that there was a "complete absence of evidence" suggesting NCPGC's participation such that "the jury's findings could only have been the result of sheer surmise and conjecture." *Cash*, 654 F.3d at 333.

NCPGC attacks several categories of evidence relied on by plaintiffs but, in order to deny NCPGC's motion, I need look no further than the evidence relating to Huang Pinqi. The record shows that Mr. Huang served as Hebei's general manager and later board chairman. In 2003, while Mr. Huang was still serving as Hebei's general manager, he also became the deputy general manager at NCPGC and remained in that position through the relevant time period. It is undisputed that Mr. Huang participated in

the meetings of the Vitamin C Subcommittee at which defendants entered into anticompetitive agreements. But, according to defendants, the evidence shows that Mr. Huang participated in those meetings as a representative of Hebei, not NCPGC. Indeed, Qaio Haili, a former Chamber official, testified that Mr. Huang always attended Subcommittee meetings as a Hebei representative and numerous documents regarding Subcommittee meetings describe Mr. Huang as a Hebei representative.

To demonstrate that Mr. Huang also participated in these meetings on behalf of NCPGC, plaintiffs rely on PX 124 — a November 2004 Chamber website announcement of Mr. Huang's election as the chair of the Vitamin C Subcommittee. PX 124 refers to Mr. Huang by his NCPGC title. Both Mr. Huang and Qaio Haili, a former Chamber official, testified that this reference was merely an honorific that does not suggest that Mr. Huang participated in the Chamber on behalf of NCPGC. The persuasiveness of this explanation obviously depends on the credibility of Mr. Huang and Mr. Qaio and, given the fact that these witnesses repeatedly questioned the accuracy of certain contemporaneously created documents, there were ample grounds for the jury to question their credibility.[6] The jury had every right to credit the documentary evidence over the conflicting testimony from defense witnesses and, in

6. For similar reasons, the jury properly could have discounted Mr. Qiao's testimony that NCPGC was not a member of the Vitamin C Subcommittee and was not eligible to be a member, especially in light of evidence showing that NCPGC participated in an agreement to fix penicillin prices despite being neither a member of the Penicillin Subcommittee nor a penicillin manufacturer.

the context of a motion for judgment as a matter of law, it is not appropriate for the Court to second-guess this determination.

Additionally, Mr. Huang never denied attending Subcommittee meetings on behalf of NCPGC and never testified that he only attended these meetings on behalf of Hebei. Although NCPGC was, of course, not required to disprove its participation, such testimony might have suggested that PX 124 could not support an inference that NCPGC participated in the conspiracy. Further, Mr. Huang testified that, prior to this election as chair of the Subcommittee, he moved his office from Hebei to NCPGC and, from that point forward, was "seldom" present at Hebei. The jury reasonably could have inferred that NCPGC participated in Subcommittee meetings at which anticompetitive agreements were entered since, when he participated in those meetings, Mr. Huang was working primarily from NCPGC. Lastly, plaintiffs produced other evidence, including NCPGC's descriptions of its activities on its website, Hebei reports concerning vitamin C manufacturing sent to NCPGC during the relevant period, and memoranda from a co-conspirator describing NCPGC's support for coordinated termination of vitamin C production. Although NCPGC criticizes each of these pieces of evidence individually, they were all put before the jury and their cumulative effect cannot be discounted. In light of PX 124, possible questions about defense witness credibility, and this other supporting evidence, I hold that there was a sufficient evidentiary basis for the jury to conclude that NCPGC participated in the conspiracy and therefore deny NCPGC's motion.

C. Reduction of Damages

Third, defendants seek a reduction of the damages award due to the Direct Purchaser Damages Class by $7.5 million ($22.5 million after trebling). According to defendants, this amount corresponds to purchases from two non-defendants alleged to be co-conspirators, Shandong Zibo Hualong Co., Ltd ("Hualong") and Anhui Tiger Biotech Co. ("Tiger"). Defendants contend that plaintiffs failed to prove that the contracts with Hualong and Tiger lacked arbitration clauses, and that if those contracts did have arbitration clauses, then plaintiffs would be relegated to arbitration, and cannot recover damages in this action.[7] Defendants argue that, because of this lack of evidence, the Direct Purchaser Damages Class did not carry its burden of proving this portion of its damages, that the Court improperly shifted the burden of proof on to defendants, and that the jury's award is speculative.

As I said when I denied defendants' Rule 50(a) motion, I think they have this precisely backwards. One can theorize all kinds of contractual provisions that might limit or eliminate the Hualong and Tiger contracts from the calculation of damages — *e.g.*, foreign selection clauses, liability caps, or shortened statutes of limitations. Defendants have seized on the possibility of an arbitration clause in these contracts, but whatever the basis for excluding them from the calculation of damages, it was

7. Pursuant the definition of the certified Direct Purchaser Damages Class, only purchasers who bought vitamin C under contracts without arbitration clauses could recover damages.

defendants' burden, not plaintiffs', to show the jury what that basis was. Any provision in those contracts that might have reduced plaintiffs' damage claim was analogous to an affirmative response to plaintiffs' damage theory, and like an affirmative defense, defendants had to point to such provisions. They failed to do so.

The Direct Purchaser Damages Class presented expert testimony from Dr. Bernheim estimating the amount of vitamin C purchases falling within the class definition based on U.S. International Trade Commission data and documents produced by the conspirators — documents which demonstrated that Hualong and Tiger were members of the Vitamin C Subcommittee and that their representatives attended meetings with the other conspirators. This evidence satisfied the Class's *prima facie* burden. If defendants wanted to dispute the Class's damages estimate, it was incumbent upon them to present evidence that the Class's *prima facie* showing was inaccurate and that certain contracts should have been excluded from the damages award. Defendants attempted to do that through the testimony of their expert, Dr. Wu, who testified that Dr. Bernheim's analysis was flawed.[8] But the jury rejected Dr. Wu's testimony, as evidenced by the award of damages in its verdict, and defendants never offered evidence showing that any contracts with Hualong and Tiger actually contained arbitration clauses. Therefore, I am not convinced that the damages award is impermissibly speculative and I deny defendants' motion

8. Defendants, however, never cross-examined Dr. Bernheim concerning his decision to include Tiger and Hualong sales in his damages estimate.

to reduce the damages award (or alter or amend the judgment) by $7.5 million ($22.5 million after trebling).

II. The Motion for a Permanent Injunction

Finally, the Injunction Class seeks a permanent injunction, lasting ten years, against defendants under Section 16 of the Clayton Act, which authorizes the district courts to issue "injunctive relief . . . against threatened loss or damages by a violation of the antitrust laws." 15 U.S.C. § 26. The parties agree that the determination of whether to issue an injunction is governed by the four-part test set forth in *eBay Inc. v. MerchExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). Under that test, "a plaintiff seeking a permanent injunction must . . . . demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 391, 126 S. Ct. at 1839. I address each requirement in turn.

First, with regard to irreparable injury, in order to obtain a Section 16 injunction, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969). Here, the Injunction Class has already proven injury,

as demonstrated by the jury verdict. Defendants argue that the jury verdict only applies to the class period — December 2001 through June 2006 — and that there is no evidence that the anticompetitive conspiracy is continuing. But that argument is unpersuasive. *See In re Data Gen. Corp. Antitrust Litig.*, MDL Dkt. No. 369, 1986 U.S. Dist. LEXIS 22076, 1986 WL 10899, at * (N.D. Cal. July 30, 1986) (imposing an injunction despite the observation that "a permanent injunction almost by definition must rest on outdated facts").

Moreover, there is evidence that anticompetitive conduct is likely to recur if not enjoined.Documentary evidence indicates that the conspirators discussed performing future actions "in a more hidden and smart way" and testimony established that, after this lawsuit was filed, conspirators stopped keeping notes of their meetings. Defendants have not renounced their conduct and they continue to contest their liability. *See Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1472 (M.D. Ala. 1993) (issuing a permanent injunction in an antitrust case where, among other things, defendants "failed to acknowledge their wrong-doing").

For the indirect purchasers, who comprise the vast majority of Injunction Class members, the injury they already suffered and any similar injury they are likely to suffer in the future is irreparable. Indirect purchasers of vitamin C cannot bring a federal claim for damages, *see generally Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), and many also lack a state law-based cause of action for damages. Further,

"[h]arm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to . . . measure, or that it is a loss that one should not be expected to suffer." *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010). It undoubtedly would be difficult to measure the injury that anticompetitive conduct would cause indirect vitamin C purchasers and no Injunction Class member should be expected to suffer injury as a result of illegal anticompetitive conduct. Accordingly, I conclude that the first *eBay* factor is satisfied.

For many of the same reasons, I conclude that the Injunction Class does not have an adequate remedy at law and the second *eBay* factor is satisfied. As noted, many indirect vitamin C purchasers cannot bring any claim for damages if defendants engage in further anticompetitive conduct. Further, even direct purchasers are only entitled to damages equal to the overcharge paid for vitamin C as a result of illegal conduct. As the eight-year (and still ongoing) history of this action attests, prosecuting international antitrust claims are difficult, costly, and time-consuming. Should defendants recommence their anticompetitive conduct, the Injunction Class will have to incur considerable expense in order to vindicate its rights.

With regard to the third *eBay* factor, the balance of hardships, contrary to defendants' contention, the injunction sought is neither "drastic" nor "extraordinary." It prohibits agreements "to fix the price or limit the supply of vitamin C sold in the United States in violation of Section 1 of the Sherman Act." In other words, all the injunction does is prohibit defendants from committing

what, independently, would constitute an illegal act. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S. Ct. 811, 841, 84 L. Ed. 1129 (1940) ("[T]his Court has consistently and without deviation adhered to the principle that price-fixing arrangements are unlawful per se under the Sherman Act."). Mandating compliance with the law can hardly be considered burdensome. And, as discussed, the Injunction Class would have to incur considerable expense if it had to vindicate its rights through another litigation. Thus, I conclude that the balance of hardships favors the injunction.

Finally, the fourth *eBay* factor concerns the public interest. Civil damages suits to enforce the antitrust laws are unquestionably in the public interest. *See Zenith*, 395 U.S. at 133, 89 S. Ct. at 1582 ("[T]reble-damage cases, which are brought for private ends, . . . also serve the public interest in that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.") (internal quotation marks omitted). Defendants contend that a permanent injunction "would interfere with the Chinese government's sovereign authority and its ability to regulate its own domestic affairs." This argument ignores the fact that the jury found defendants liable based on voluntary, uncompelled conduct. If, in the future, the operation of the permanent injunction comes into conflict with China's sovereign regulatory authority, defendants, or any other enjoined party, may seek to have the injunction vacated or limited on that basis. However, the Court will not deny the Injunctive Class relief to which it is otherwise entitled on the basis of speculative and uncertain future interference

with the regulatory authority of another nation. Therefore, I conclude that a permanent injunction is in the public interest and that the Injunction Class is entitled to the permanent injunction it seeks.

CONCLUSION

Defendants' renewed motion for judgment as a matter of law [688] is denied and the Injunction Class's motion for a permanent injunction [693] is granted. An Amended Judgment and Decree will issue by separate order.

SO ORDERED.

Dated: Brooklyn, New York
November 25, 2013

APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED SEPTEMBER 6, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06-MD-1738 (BMC)(JO)

IN RE VITAMIN C ANTITRUST LITIGATION.
This document refers to: All Actions.

September 6, 2011

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

Plaintiffs have filed suit against Chinese vitamin C manufacturers, alleging that they engaged in an illegal cartel to fix prices and limit supply for exports, including those to the United States.[1] The four main defendants are Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome" or "Welcome"), Aland (Jiangsu) Nutraceutical Co., Ltd. ("Jiangsu Jiangshan" or "JJPC"), Northeast

1. Two similar price-fixing suits are currently pending against Chinese producers of magnesite and bauxite. *See Animal Science Prods., Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010), *vacated*, 654 F.3d 462, 2011 U.S. App. LEXIS 17046, 2011 WL 3606995 (3d Cir. Aug. 17, 2011); *Resco Prods., Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235, 2010 U.S. Dist. LEXIS 54949, 2010 WL 2331069 (W.D. Pa. June 4, 2010).

Pharmaceutical Co. Ltd. ("NEPG" or "Northeast") and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (collectively "defendants").[2]

Plaintiffs bring this putative class action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. Plaintiffs seek treble damages and injunctive relief against all defendants except for Northeast, against whom only injunctive relief is sought.

Defendants do not dispute that the cartel agreements at issue violate the antitrust laws save for one primary defense: that they were compelled by the Chinese government to fix prices. They have filed a motion for summary judgment based upon that defense and the related doctrines of comity and act of state.

The three doctrines upon which defendants rely recognize that a foreign national should not be placed

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2. There are also other defendants that do not manufacture vitamin C, including JSPC America, Inc. ("JSPCA"), a subsidiary of JJPC, Shijiazhuang Pharmaceutical (USA) ("Shijiazhuang"), Inc., an affiliate of Weisheng, and China Pharmaceutical Group Ltd. ("China Pharmaceutical"), the owner of Weisheng and Shijiazhuang. The complaint also names North China Pharmaceutical Group ("NCPC Group Corp."), North China Pharmaceutical Group Co. Ltd., ("NCPC Ltd.") and North China Pharmaceutical Group Corporation Import and Export Trade Co., Ltd. ("NCPC I&E") (collectively "North China defendants"). Welcome, is a partially-owned subsidiary of NCPC Ltd., which is, in turn, a partially-owned subsidiary of NCPC Group Corp. NCPC I&E is an indirectly owned subsidiary of NCPC Group Corp. that purchases vitamin C from Chinese companies including Welcome.

between the rock of its own local law and the hard place of U.S. law. However, that concern is insufficient to protect defendants from their acknowledged violation of the antitrust laws because, here, there is no rock and no hard place. The Chinese law relied upon by defendants did not compel their illegal conduct. Although defendants and the Chinese government argue to the contrary, the provisions of Chinese law before me do not support their position, which is also belied by the factual record. I decline to defer to the Chinese government's statements to the court regarding Chinese law.

Accordingly, defendants' motion for summary judgment is denied.

(1)

BACKGROUND

By November 2001, defendants, who faced much lower manufacturing costs than their foreign competitors, had captured over 60% of the worldwide market for vitamin C. China's share of vitamin C imports to the United States rose from 60% in 1997 to over 80% by 2002. Around this time, a number of foreign competitors discontinued or reduced production.

It is not disputed that defendants fixed prices and agreed on output restrictions. Defendants are members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber"). Many of the agreements at issue were reached at meetings

of the Chamber and appear to have been, at the very least, facilitated by the Chamber. Defendants, however, contend that the Chamber is a government-supervised entity through which the Chinese government exercises its regulatory authority over vitamin C exports and that all of the agreements at issue were compelled by the Chinese government.

After plaintiffs filed suit, defendants moved to dismiss the complaint, invoking the foreign sovereign compulsion defense, the act of state doctrine and the doctrine of international comity. The Ministry of Commerce of the People's Republic of China ("The Ministry"), which is the highest authority in China authorized to regulate foreign trade,[3] filed an amicus brief in support of defendants' motion, explaining the Chinese government's regulation of vitamin C exports. The Ministry "formulates strategies, guidelines and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system." The Ministry is equivalent to a cabinet level department in the United States. According to the Ministry, defendants' actions were compelled by the Chinese government.

Judge David G. Trager denied defendants' motion to dismiss, finding the record, at that time, to be "simply too ambiguous to foreclose further inquiry into the

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3. The Ministry was originally known as the Ministry of Foreign Trade and Economic Cooperation (or "MOFTEC"). For ease of reference, "the Ministry" is used to refer to both entities.

voluntariness of defendants' actions."[4] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008). With the benefit of some discovery, plaintiffs had offered evidence suggesting that defendants' agreements may have been voluntary. In addition, Judge Trager was concerned with the possibility that the cartel and purportedly compulsive governmental regulations at issue had been established at the behest of defendants and the Chinese government had simply given its "imprimatur."

Defendants now move for summary judgment on their three related defenses. Although the initial complaint in this suit was filed in January 2005, the operative complaint for the purposes of the instant motion covers the time period from December 1, 2001 through December 2, 2008.

(2)

CHINESE LAW

I. China's Economic Transition and the Establishment of the Chambers

In 1978, China began to transition from a planned economy to a "socialist market economy." During the planned economy era, the control of foreign trade was centralized under the Ministry and all foreign trade was conducted through state-owned import and trade companies according to state trade plans. After some

4. This case was reassigned to me in January 2011 following the death of my dear colleague, Judge Trager.

reforms in the mid-1980's led to aggressive forms of competition, the government imposed new administrative controls, which involved the establishment of the various China Chambers of Commerce for Import and Export ("Chambers"), including the Chamber. According to defendants' Chinese law expert, Professor Shen Sibao,[5] the formation of the Chambers was part of China's "important national policy which requires Chinese exporting companies to 'unite and act in unison in foreign trade.'"

The authority to regulate import and export commerce was eventually transferred from the state-owned trading companies to these Chambers. When the Chambers were created, they were staffed with personnel transferred directly from the government.

The Chambers were given both governmental functions, which had previously been performed by the Ministry, and private functions. The governmental functions included, *inter alia*, responding to foreign anti-dumping charges and industry "coordination." The private functions of the Chambers included organizing trade fairs, conducting market research and "mediating" trade disputes.

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5. Plaintiffs do not have a Chinese law expert and, instead, attempt to make their case by relying on the plain language of: (1) directives issued by the Ministry; (2) charter documents of the Chamber and its sub-committee that dealt with the vitamin C; and (3) public statements made by the Chinese government and various Chambers to the World Trade Organization ("WTO") and the United States government.

Appendix C

II. 1996 Interim Regulations

The first governmental directive cited in the Ministry's brief is the Interim Regulations of the Ministry on Punishment for Conduct of Exporting at Lower-than-Normal Price ("1996 Interim Regulations"), which were promulgated on March 20, 1996.[6] The 1996 Interim Regulations, which applied to all export products produced in China, address the Ministry's power to punish enterprises for exporting at "lower-than-normal" prices. Potential punishments include "a notice of criticism" and monetary fines. According to the regulations, a normal price includes the costs for producing the product as well as "reasonable profit." The Ministry could request the Chambers to investigate alleged violations of the regulations. The 1996 Interim Regulations also note that "[a]ll export enterprises shall . . . follow the coordination by various chambers of commerce for import and export trade, and set export prices which are suitable in countries to which the goods are exported."

Although not raised by either party, according to a recent decision by the World Trade Organization ("WTO"), the 1996 Interim Regulations were formally repealed on September 12, 2010. WTO, Panel Report, WT/DS394/R, WT/DS395/R, WT/DS398/R, *China-Measures Related to the Exportation of Various Raw Materials* (July 5, 2011) ("WTO Panel Report"), ¶ 7.1029 (citing Order No. 2

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6. The record includes various regulatory documents issued by the Ministry that have various titles such as "Regulations," "Decision" and "Notice." These types of documents are collectively referred to herein as "governmental directives."

of 2010 (promulgated by the Ministry on Sept. 12, 2010)). However, in this proceeding before the WTO ("WTO Proceeding"), China asserted that it "ceased to impose . . . penalties [under the 1996 Interim Regulations]" as of May 28, 2008 when "verification and chop," which required export contracts to receive an official seal, was repealed.[7] *Id.* ¶ 7.1031.

III. 1996 Conference and Report

In early 1996, the Ministry held a conference and issued a report addressing problems in the vitamin C industry. Although China's vitamin C industry had rapidly expanded, the industry faced a number of problems including: (1) "violations of export administration regulations" and "the lack of strong administration and coordination of exports"; (2) a glut of capacity and Chinese vitamin C producers; (3) "disorderly" and fierce export competition that resulted in companies "blindly cutting prices"; and (4) threats of foreign anti-dumping suits. To combat these problems, the report recommended restricting production in order to "preserve price," barring expansion of production capacity and consolidating the numerous vitamin C producers.

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7. In the WTO Proceeding, the United States and other countries challenged Chinese export restrictions on certain raw materials. Although vitamin C is not at issue in the WTO Proceeding, one of the raw materials in dispute was, like vitamin C, also subject to verification and chop.

Appendix C

IV. 1997 Notice and 1997 Charter

In November 1997, the Ministry and the State Drug Administration ("SDA") promulgated the Notice Relating to Strengthening the Administration of Vitamin C Production and Export by [the Ministry] and [SDA] (the "1997 Notice"). The purpose of the 1997 Notice was "to rectify the operational order and optimize the operational team of Vitamin C export, realize the scale-operation on export, improve the competitiveness of our Vitamin C products in the international market, promote the healthy development of Vitamin C export and maintain the interest of our country and enterprises . . . ."

The regulatory scheme under the 1997 Notice had three primary components. First, the 1997 Notice required export licenses, which were granted by the government based on certain qualifications, including prior production output. Second, the Ministry set export quotas for the total volume of vitamin C that could be exported and export quotas for each individual company. Third, the 1997 Notice generally directed the Chamber to "improve the coordination on Vitamin C export [,]... supervise [the implementation of the 1997 Notice], and timely report to [the Ministry] about the relevant issues and problems." To meet these goals, the Chamber was required to establish the Vitamin C Subcommittee (the "Subcommittee"). All exporting enterprises were required to participate in the Subcommittee and to "subject themselves to the coordination of the [the Subcommittee]." The Subcommittee was directed to, *inter alia*, establish a mandatory minimum export price. Under the 1997 Notice,

"the Ministry itself did not decide what specific prices should be," leaving that to the Subcommittee.

Only enterprises that followed the coordinated price and volume quotas would receive export licenses. For violations of the "relevant provisions" of the 1997 Notice, including "competing at low price and reducing price through any disguised means," enterprises could be punished through a reduction of their export quotas and even complete revocation of their export licenses.

In October 1997, the Subcommittee enacted a charter (the "1997 Charter") in accordance with the charter of the Chamber and the 1997 Notice.[8] According to the 1997 Charter, the Subcommittee was organized around certain tenets, including "complying with laws of the country, implementing and executing the state policies and regulations on foreign trade [and] maintaining orderly export of Vitamin C products . . . ." The Subcommittee was to perform "coordination, direction, consultation, service and supervision & inspection functions over its members. It bridges and ties the enterprises and the government." Under the 1997 charter, the Subcommittee was supposed to, *inter alia*, supervise the implementation of export licenses, advise the Ministry on export quotas and "coordinate and administrate market, price, customer and operation order of Vitamin C export."

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8. The 1997 Charter was enacted on October 11, 1997, which is prior to the promulgation of the 1997 Notice (November 27, 1997), the effective date of the 1997 Notice (January 1, 1998) and the Ministry's approval of the Subcommittee (March 28, 1998).

Appendix C

According to the 1997 Charter, "[o]nly the members of the Sub-Committee have the right to export Vitamin C" and to obtain a "Vitamin C export quota." In return, members of the Subcommittee were obligated to "comply with various directives, policies and regulations with respect to foreign trade, comply with the Charter and regulations of [the Subcommittee] and to implement Sub-Committee's resolution." Specifically, the members were required to "[s]trictly execute export coordinated price set by the Chamber and keep it confidential."

For violations of the 1997 Charter or any resolution issued by the Subcommittee, a member could be punished through a warning, open criticism and even revocation of its membership. In addition, the Sub-Committee would "suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member."

On March 21, 2002, the Ministry abolished the 1997 Notice and other regulations,

> [i]n order to adapt to the new situation of our country's opening-up to the outside world, to further establish and improve the legal system of the socialist market economy, to earnestly perform the promises of our country's entry to the WTO, to accelerate the transformation of the functions of the government and to improve the level of administration ....

Only a few months earlier, the Ministry had issued regulations ("the 2002 Regulations"), which repealed, as

of January 1, 2002, another directive that had subjected vitamin C and other products to export licensing and export quotas beginning on December 29, 1992 (the "1992 Interim Regulations").

V. 2002 PVC Notice and the Institution of Verification and Chop

Shortly after abolition of the 1997 Notice, the Ministry and the General Administration of Customs ("Customs") issued a notice on March 29, 2002 establishing an export regime referred to as "Price Verification and Chop" (the "2002 PVC Notice"). The 2002 PVC Notice became effective on May 1, 2002. Thirty categories of products, including Vitamin C, were now subject to "Price Verification and Chop . . . by the chambers, and [were] no longer subject to supervision and review by customs." "Following the adjustment made under [the 2002 PVC Notice], the relevant chambers" were required to submit to Customs, by April 20, 2002, "information on industry-wide negotiated prices." According to the Ministry, under verification and chop, Customs would only permit export if the relevant contract was reviewed by the Chamber and received a "chop," which is a special seal that the Chamber would affix to the contract indicating its legality (and, more importantly, the absence of which would indicate its illegality.)

The 2002 PVC Notice explains that:

> [the Ministry] and [Customs] have made the decision to adjust the catalogue of export

> products subject to price review by customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed . . ., promote industry self-discipline and facilitate the healthy development of exports.

According to the 2002 PVC Notice, "[t]he adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline."

The 2002 PVC Notice also provides that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs]" (hereinafter "Suspension Provision").

VI. 2003 Announcement

On November 29, 2003, the Ministry issued a new directive, effective January 1, 2004, that continued the verification and chop system (the "2003 Announcement"). This was done "[i]n order to maintain the order of foreign trade and create a fair trade environment and in response to the demands of the industries engaging in export and import, as well as on the basis of the coordination by relevant industrial associations . . . ."

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According to the 2003 Announcement, "[e]ach [Chamber] shall . . . strictly observe the Procedures for Implementing the Verification and Chop System on Export Commodities" ("2003 Procedures"), which are attached to the 2003 Announcement. The 2003 Procedures, which explain the verification and chop process in greater detail,[9] state:

> exporters shall deliver . . . the export contracts . . . to the relevant Chambers for verification before Customs declaration. If it is verified that the contracts are correct, the Chambers shall fill in the Verification and Chop Form of [the relevant Chamber] and affix the counter-forgery V&C chop at the designated block of the V&C Form and to the export contacts at the blocks *where prices and quantities are specified*, and then deliver them back to the exporters.
>
> * * * *
>
> The Chambers *shall verify the submissions by the exporters based on the industry agreements* and in accordance with the relevant regulations promulgated by [the Ministry] and [Customs]. . . . The relevant Chambers shall file the industry agreements with [the Ministry] and [Customs] within 10 days after the public announcements [for such industry agreements] are made . . . .

9. Although the 2002 PVC Notice indicates that there were similar explanatory regulations related to the 2002 PVC Notice, those regulations are not part of the record.

> (Emphasis added). If a contract did not have a chop, Customs would not accept the contract and the goods could not be exported. Enterprises that forged the chop were to "be punished by the [Chambers] according to relevant rules."

The 2003 Procedures also contain a provision addressing non-members, which provides that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters."

VII. 2002 Charter

On June 7, 2002, after the 2002 Notice became effective, the Subcommittee approved a revised charter (the "2002 Charter"). The 2002 Charter describes the Subcommittee as "a self-disciplinary industry organization jointly established on a voluntary basis by those [Chamber] members which conduct import and export of vitamin C." According to the 2002 Charter, the purposes of the Subcommittee are:

> to observe the state laws, regulations and the Articles of Association for [the Chamber], to coordinate and guide the Vitamin C import and export business as well as related activities, to provide consultation and services to its members and relevant governmental departments, to maintain the normal working order of vitamin C import and export operations, to ensure fair competition, to protect the national interest and the legal rights and interests of its members,

and to promote the healthy development of the vitamin C import and export trade.

The 2002 Charter also provides that: "The Subcommittee shall coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members" According to the 2002 Charter, "obligations" of members include "[i]mplement[ing] the resolutions and agreements of the Subcommittee" and "[a]ccept[ing] the coordination of the Subcommittee."

Although the 2002 Charter is, in many respects, similar to the 1997 Charter, there are some differences. Most notably, the 1997 Charter never states that the Subcommittee was established on a "voluntary basis." In addition, unlike the 2002 Charter, the 1997 Charter provides that "[o]nly the members of the Sub-Committee have the right to export Vitamin C" and to obtain a "Vitamin C export quota." These differences between the two charters make sense given that, under the 2002 PVC Notice and 2003 Announcement (collectively the "2002 Regime"), membership in the Subcommittee was no longer required in order to export vitamin C.

The penalty provisions in the two charters also differ. Although the 1997 Charter provided that "[t]he Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member," this provision is absent from the

2002 charter. In addition, although the 1997 Charter and the 2002 Charter both provide that the Subcommittee can discipline members through public criticism, a warning or termination of membership, because non-members can export under the 2002 Regime, revocation of membership would not necessarily have the same effect under the 2002 Regime. The 2002 Charter also includes an enforcement provision that is not included in the 1997 Charter. The 2002 Charter provides that "[i]n order to monitor the implementation of industry self-disciplinary agreements, coordination plans, or industry resolutions, upon approval by relevant members, the Subcommittee can collect a security deposit in the specified amount for breach of agreement."

Finally, although the Subcommittee includes both representatives from the Chamber and representatives from the members, the 2002 Charter appears to require majority voting by the members alone to take any action.

VIII. May 2002 Agreement

On May 25, 2002, less than two weeks before the 2002 Charter was passed, the Subcommittee met to discuss revising the 1997 Charter. At this meeting, the Subcommittee agreed that that "[a] company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies)" (hereinafter the "May 2002 agreement"). The May 2002 agreement, however, is not reflected, in any way, in the 2002 Charter.

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IX. Repeal of Verification and Chop

Although not raised by either party, according to the WTO Panel Report, it appears that the 2003 Announcement was formally repealed on May 26, 2008. WTO Panel Report, ¶¶ 7.1013, 7.1056-1057 (citing Communication ([Ministry] and [Customs] (2008) No. 33, May 26, 2008)).

X. Charter of the Chamber

The Chamber's own charter (the "2003 Chamber Charter") contains language similar to that found in the Subcommittee's 2002 Charter. The Chamber describes itself as "a national-wide and self-disciplined social entity voluntarily organized by [importers and exporters of] medicines and health products." According to the 2003 Chamber Charter, the objectives of the Chamber are [*inter alia*] to "coordinate and guide the import and export of medicines and health products . . . maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade [and] safeguard lawful rights and interests of member organizations." Potential penalties for violations of the 2003 Chamber Charter, "coordination regulations or the Chamber's directives" mirror those found in the 2002 Charter.

With regard to vitamin C, other literature issued by the Chamber along with the 2003 Chamber Charter indicates that the Chamber's Pharmaceutical Department has a number of responsibilities, including "help[ing] the government to manage the import and export of some

products, such as Vitamin C ...." and "coordinat[ing] and manag[ing]" various sub-chambers, including the Vitamin C sub-chamber.

XI. Relationship between the Ministry and the Chamber

Three sources address the relationship between the Ministry and the Chamber: (1) "[The Ministry] Measures for Social Organizations, Measure for Administration over Foreign Trade and Economic Social Organizations," dated Feb. 26, 1991 ("1991 Measures"); (2) the "Notice of [the Ministry] regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters," dated September 23, 1994 ("1994 Notice"); and (3) the 2003 Chamber Charter.

Pursuant to the 1991 Measures, the Ministry has a supervisory role over organizations "established with coordination and industry regulation functions." This supervisory role includes responsibility for the "daily management" of the organizations, which the 1991 Measures define to include examining the structure, personnel and budget of the organizations and formulating the salaries and benefit plans for the organizations. The 1991 Measures also state that "[s]ocial organizations established with coordination and industry regulation functions as authorized by the [the Ministry] must implement the administrative rules and regulations relating to foreign trade and the economy."

The 1994 Notice, and the regulations annexed thereto, specify that: (1) "[t]he candidates for the senior positions of the chamber are recommended by [the Ministry] (or recommended by over 1/3 of the chamber's member companies and approved by [the Ministry]) and then elected or dismissed by the general meeting of members"; (2) the Chamber's employees are to be chosen primarily from member organizations or the competent authorities in charge of foreign trade; (3) the Chamber's headcount of employees must be verified and approved by the Ministry and then by the Ministry of Civil Affairs; and (4) the Ministry must verify and approve the Chamber's budget for total employee salaries.

The 2003 Chamber Charter and accompanying literature also address this relationship, stating that the Chamber implements the government's policies, regulations and "authorization," and "accepts the guidance and supervision of the responsible departments under the State Council." In addition, mirroring the requirements set out in the 1994 Notice, the 2003 Chamber Charter provides that "the candidates for the president, vice-presidents and secretary-general [of the Chamber] may be recommended by the competent authorities, or be recommended jointly by more than one third of members and approved by the competent authorities."

XII. WTO and Public Trade Documents

In public statements to the WTO and the United States government, the Chinese government has made representations regarding its regulation of exports

generally as well as its specific regulation of vitamin C exports. *See* Report of Dr. Paula Stern ("Stern Report") (identifying such statements).

In certain documents, China represented that, as of January 1, 2002, it gave up "export administration . . . of vitamin C." In one document, under the heading "any restrictions on exports through non-automatic licensing or other means justified by specific product under the WTO Agreement or the Protocol," China represented that "[f]rom 1 January 2002, China gave up export administration of . . . vitamin C." WTO, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China, G/C/W/438 (2002)[10]; *see also* Stern Report at 7 (citing WTO, Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade and Goods, G/C/W/441 (2002), which states, under the heading "[n]on-automatic export licensing requirements under WTO agreement and accession commitments," that "[f]rom January 1, 2002, China gave up export administration of . . . vitamin C."). These WTO documents were not before Judge Trager at the motion to dismiss stage.

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10. This document is not directly cited in the Stern Report, on which plaintiff rely. The Stern Report cites to a "Trade Policy Review" conducted by the WTO, which states that "[o]n January 1, 2002, China abolished export quotas and licenses for, inter alia, . . . Vitamin C." Stern Report at 8 (citing WTO, Trade Policy Review, WT/TPR/S/161Rev.1 (2006)). In support of this proposition, the "Trade Policy Review" cites to WTO, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China, G/C/W/438 (2002).

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XIII. The Ministry's Statements in the Instant Litigation Concerning "Self-Discipline"

In an additional statement submitted on summary judgment (the "2009 Statement"), the Ministry describes the Chinese "system of self-discipline." According to the 2009 Statement:

> [The system of 'self-discipline'] has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.

According to the Ministry, vitamin C exporters were governed by self-discipline regulation, the objectives of which were "to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition." The 2009 Statement also

discusses the Ministry's delegation of authority to the Chamber regarding self-discipline.

XIV. 1998 Opinions

In discussing the notion of "self-discipline prices," Professor Shen and a number of commentators cite to an August 1998 directive issued by the State Economic and Trade Commission ("SETC") entitled "Opinions On Self-Discipline Pricing For Certain Industrial Products" ("1998 Opinions"). Wang Xiaoye, The Prospect of Anti-Monopoly Legislation in China, 2002 Wash. U. Glob. Stud. L. Rev. 201, 208-09; Shen Report ¶ 70. The 1998 Opinions, which only involved domestic prices, "demanded that the producers of certain industrial products observe the minimum price limits set by their respective trade associations." Wang Xiaoye, 2002 Wash. U. Glob. Stud. L. Rev. at 208; *see also* Scott Kennedy, The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System, The China Journal No. 49, 19 (Jan. 2003). The minimum prices were based on a product's average costs in the industry. Kennedy, The China Journal No. 49, 19; *see also* Wang Xiaoye, 2002 Wash. U. Glob. Stud. L. Rev. at 209.

(3)

ACTIONS OF CHINESE MARKET PARTICIPANTS

I. The 1997 Regime

Between the promulgation of the 1997 Regime and April 2001, the Subcommittee held a number of meetings

where defendants reached agreements on price and export quotas. These meetings were attended by officials from both the Chamber and the Ministry.

In 1997, the price of vitamin C was $4.4/kg. At some point, defendants set the minimum price at $5.3/kg and the price rose to at least $5/kg. However, between May 2000 and December 2001, there was a "price war," which resulted in export prices dropping to less than $2.8/kg. This appears to have been caused by an expansion in China's production capacity that stemmed from an apparent "misunderstanding" at a 1999 Subcommittee meeting.

In December 2000, the minimum export price was $5.1/kg. However, as it appears that none of the defendants were following that price, defendants agreed to "nullify" that price and submitted this agreement to the Ministry "for approval."[11]

At a Subcommittee meeting in April 2001, the attendees discussed a drop in the price and the recent expansion in China's production capacity. At one point during the meeting, the representative from the Ministry informed the members that:

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11. Although the Ministry's counsel suggested at oral argument that, under both the 1997 Regime and the 2002 Regime, the Ministry had "plenary authority" over prices and the power to accept or reject a price, there is no evidence of any industry agreements reached under the 2002 Regime being submitted to the Ministry "for approval." The 2002 PVC Notice, however, does require the Chamber to file an "annual price review report" with the Ministry and Customs.

> Even though VC is not a resource product, it has been strictly regulated since 1997. Regarding the effects of current regulations, generally speaking, the regulation has not been very successful. [The Ministry] attaches importance to the establishment and development of the Chamber, and requires sub-committees to act proactively. Enterprises need to obey the industry agreements and industry rules. When enterprises are maximizing their profits, they also need to consider the interest of the state as a whole.

At the meeting, the manufacturers agreed to reduce the minimum export price from $5.10/kg to $3.20/kg, presumably in accordance with the agreement at the December 2000 meeting. The minutes go on to state that: "However, because the manufacturers have not agreed on the enforcement mechanisms of the verification and chop system, it remains a major question whether this price limit can be enforced effectively."

II. Transition to the 2002 Regime

In September and November 2001, the Ministry learned that the European Union was considering bringing an anti-dumping suit against the Chinese vitamin C manufacturers. This information was forwarded to the Chamber. On one document, handwritten notes, apparently from Ministry officials, state: (1) "[p]lease

review and get prepared"; (2) "please review and address it"; and (3) "[p]lease investigate this matter."[12]

On November 16, 2001, the Chamber held a meeting with defendants.[13] At the meeting, defendants, "by way of hand voting," agreed to raise the "coordinated export price" to $3/kg starting on January 1, 2002. Defendants also agreed to limit the total export volume for 2002 to 35,500 tons (with each company receiving individual export volume allocations) and to not expand their production capacity. Defendants' agreement was "aimed at enhancing the self-discipline of the industry." In December 2001, the Chamber convened another meeting amongst defendants to discuss implementing this agreement.

Not only is there no affirmative evidence of compulsion in the documents discussing this agreement, but these documents also suggest, on their face, that this

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12. Defendants' 56.1 Statement does not discuss any of the events that occurred after this information was forwarded to the Chamber. Although defendants' briefs discuss a few of those events in a handful of scattered passages, defendants contend that all of the facts relied on by plaintiffs are "either irrelevant or, in any event, do not prevent entry of judgment in Defendants' favor" because the instant motion should be decided strictly as a matter of a law.

13. The meeting was presided over by Qiao Haili, a Chamber official and Secretary-General of the Subcommittee, who appears to have attended all of the formal Subcommittee meetings held under the 2002 Regime. Although no representative from the Ministry was present at the November 16, 2001 meeting, minutes of the meeting and a copy of the agreement reached at the meeting were forwarded to the Ministry.

agreement was voluntary.[14] One states, for example, that the participants "concluded that Chinese Vitamin C manufacturers are absolutely capable of realizing the self-discipline of the industry" because (1) China has lower gross costs; (2) "production of Vitamin C in China is highly centralized in four manufacturers and thus, it is relatively easy to reach unison within the industry"; (3) supply is in balance with demand and price declines are psychological; and (4) there is strong growth in demand for Vitamin C as an "irreplaceable product." Another states:

> [a]nalysis from persons within the industry was that the enterprises were able to sit down together at this particular time because VC prices had reached rock bottom, and no one could sustain a further slide; the next reason was, because the country had opened up the commercial products business from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation.

Similarly, a summary of the December 2001 meeting from Chamber's website notes that:

> through efforts by the Vitamin C Sub-Committee of [the Chamber]. . . domestic manufacturers were able to reach a self-

14. Defendants do not contest the admissibility of any of the documents relied on by plaintiffs. In addition, not only have plaintiffs offered evidence establishing the admissibility of many of the documents, but, in some instances, witnesses explicitly confirmed at their depositions that the documents accurately reflected what occurred.

> regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports to achieve the goal of stabilization while raising export prices. Such self-restraint measures, mainly based on 'restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically' have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention. Beginning on May 1, 2002, vitamin C was listed as a product requiring price reviews by China's Customs and a seal of pre-approval by the [Chamber], which has provided powerful oversight and safeguards for the implementation of self-restraint agreements among domestic manufacturers.

(Emphasis added).[15]

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15. This is the only factual evidence in the record that the Ministry's submissions explicitly address. In its amicus brief, the Ministry asserted that:

> in the context of the Ministry's regulation of the vitamin C industry through the Chamber[,] . . . the characterizations by the Chamber of the conduct as 'self-restraint' and 'voluntary' are unremarkable. The vitamin C industry was under a direct Ministry order to reach a 'coordinated' agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber would express its pleasure publicly that the parties were able to comply with the Ministry' order to coordinate pricing and quantities on their own

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Some documents discussing the November and December 2001 meetings imply that verification and chop was used to enforce the parties' agreement. However, none of these documents clearly state that defendants' agreements restricting output were enforced through verification and chop. In fact, the document quoted above explicitly refers to "price reviews."

III. The 2002 Regime

A. Meetings and Agreements

Between the beginning of 2002 and the filing of the initial complaint on January 26, 2005, the Subcommittee held numerous "coordination" meetings where defendants reached agreements regarding price and output. There were also a number of Subcommittee meetings where no agreements were reached.[16]

B. Evidence of Voluntariness

Similar to the record regarding the November 2001 agreement, the relevant documents contain no affirmative evidence of compulsion and, a number of these documents,

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(i.e., 'voluntarily' and in 'self-restraint') as opposed to requiring more direct Ministerial intervention.

16. During the pre-filing period, a representative of the Ministry only attended one Subcommittee meeting, which addressed dumping concerns.

on their face, suggest voluntariness.[17] For example, one documents notes:

> In 2003, it is expected that the export quota management system will be kept and continue to play a positive role. But, because the international market has turned for the better considerably when compared with the situation in early 2002, the *willingness and actual effectiveness of various manufacturers to cooperate will be lower than the days when the market had a difficult time.*

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17. The relevant documents make numerous references to "coordination" and "self-discipline." According to the Ministry and Professor Shen, terms such as "coordination," "industry self-discipline" and "voluntary self-restraint" have particular meanings in the context of China's regulatory regime. Thus, the use of such terms may not, in and of themselves, necessarily indicate voluntariness. However, beyond the use of such terms, there is independent factual evidence in the record indicating voluntariness. For example, irrespective of what "industry self-discipline" may mean, there is evidence in the factual record, discussed infra, indicating that, in June 2004, Weisheng violated a shutdown agreement without penalty and that its decision to agree to a new shutdown agreement stemmed solely from problems that Weisheng had with its production line (and not, as defendants' employees now claim, from any compulsion by the Chamber). Furthermore, there does not appear to be any compulsion inherent in "self-discipline" and related terms. Rather, any compulsion is dependent on the specifics of the governmental directives in effect at the time. According to the 2009 Statement, self-discipline regulation required vitamin C exporters to "to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations." Therefore, references to "self-discipline" would appear to imply compulsion only if the specific governmental directives underlying the 2002 Regime involved compulsion.

(Emphasis added). Similarly, a speech made two days after the instant suit was filed states:

> These VC enterprises, mediated by the [Chamber], took measures [in 2004] to limit production to protect price and to ensure a 'soft-landing' of the price plunge, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time.

C. Minimum Price

According to defendants' interrogatory answers and the deposition testimony of Wang Qi, a JJPC executive, beginning in May 2002, the minimum price was $3.35/kg throughout the relevant period. However, there is other evidence indicating that, at certain times, higher minimum prices were in effect or no minimum price was in place. An official notice issued by the Chamber in early 2003 indicates that, at the time, there was no minimum price in effect for Vitamin C (or, possibly, that verification and chop had been suspended). Although the notice lists minimum prices for two other products subject to verification and chop, the minimum price field for vitamin C is blank.

Later in the spring of 2003, defendants set a minimum price above $3.35/kg and violated it without punishment. After the price of vitamin C rose in the spring of 2003 to around $15/kg, the price began to rapidly drop. Although defendants agreed at a June 2003 Subcommittee meeting to set a "floor price" of $9.20/kg, this price was not

followed; within a few weeks, every manufacturer was quoting prices below this "floor" price. At a meeting in July 2003, the $9.20/kg price was cancelled and the verification and chop price was restored to $3/kg.

It should also be noted that Ning Hong, the primary person at NEPG responsible for negotiating vitamin C prices with American customers, made a number of statements at his deposition suggesting that defendants were rarely, if ever, required to follow the minimum price under verification and chop. Additionally, there is other evidence indicating that NEPG made sales below the minimum price in May and June 2002 and that defendants consistently sold below the minimum price during substantial portions of 2005 and 2006.

D. Weisheng's Violation of June 2004 Shutdown Agreement

On May 12, 2004, the Subcommittee held a meeting to coordinate an upcoming June production stoppage that defendants had previously agreed to undertake. However, at the meeting, Weisheng announced that it would not participate in the production stoppage. According to Kong Tai, the general manager of JJPC, Weisheng "unilaterally tore up the agreement" for the planned June shutdown. "[U]sing the pretext of conducting a trial run," Weisheng announced it would stop production on an old production line, but not on its "new 15,000-ton production line, where . . . a trial run had been formally launched" four days earlier. "As a result, the agreement fell apart and plans for ceasing production in June were canceled."

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On May 24, 2004, Welcome, Northeast and JJPC met and decided on a new shutdown agreement, which appears to have hinged on whether Weisheng would also participate. At a May 28, 2004 internal JJPC meeting, Kong Tai suggested that the possibility of Weisheng participating "was not great." Similarly, an undated NEPG document doubted whether defendants could execute the agreed June shutdown as planned and noted that if the agreement were not followed "the impact on the market will be very serious."[18]

On June 15, 2004, defendants attended a "VC regulation meeting." According to a monthly report prepared by Wang Qi, "[a]t this meeting, Weisheng . . . re-proposed the agenda for quoting while stopping production, *because their production line had problems.*" (Emphasis added).

Defendants' employees asserted, at their depositions, that the Chamber called this meeting, penalized Weisheng for its actions and required Weisheng to agree to the shutdown plan reached at the June 15 meeting. According to Feng Zhen Ying, an employee of Weisheng, when Weisheng initially refused to participate in the shutdown,

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18. This document's additional prediction that if the shutdown agreement could be "executed as scheduled .... it will have a profound significance for the confidence in forming a continuous mechanism similar to the 'price control mechanism' in the future," is further evidence of the voluntariness of defendants' agreements, particularly regarding output restrictions. Moreover, this document indicates that defendants viewed the mechanism for controlling prices as distinct from the mechanism for restricting output.

Weisheng was "penalized by the [Chamber]," which did not allow Weisheng to run its new production lines, even for dry trial runs. According to Wang Qi, when Weisheng failed to follow the original agreement, "the allocation of their quotas were delayed." Feng Zhen Ying also testified that although "Weisheng had a different opinion about the proposed production shutdown" "under the mandatory requirement of the [Chamber, Weisheng] eventually went along" and shut down production. He asserted that "it was mandated by the government that all manufacturers have to shut down together." Similarly, Wang Qi testified that, "the [Chamber] forced Weisheng to come up with a new plan, with a plan for stoppage . . . . [a]nd forced Weisheng to express . . . consent to this stoppage of production." None of the documentary evidence, however, supports this testimony.

It should also be noted that, at his deposition, Wang Qi admitted that the original shutdown agreement that Weisheng breached did not contain "any clear provisions for penalty." This apparently led someone (perhaps Wang Qi himself) to conclude that subsequent production shutdown agreements should include "very clear cut [penalty] conditions." Relatedly, Wang Qi also testified that, at the time of Weisheng's breach, the Chamber had never considered how to address violations of its "mandatory instructions."

Even after defendants agreed to the new shutdown agreement following Weisheng's breach, defendants were still predicting fierce price competition and even thought that it was possible that prices would fall below costs.

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IV. Post-Filing Evidence

There are numerous documents in the record created by defendants after the initial complaint in this case was filed on January 26, 2005. These documents indicate that defendants continued to reach agreements in the post-filing period. According to minutes from an April 19, 2005 meeting, at the meeting, Qiao Haili stated that: "[t]he recent antitrust lawsuit is unprecedented, but we shall not suspend the coordination mechanism of the VC industry in our country. If we fail to coordinate, the price will drop and we will face more fearful consequences: the falling price will further trigger antidumping lawsuits . . . ."

Plaintiffs suggest that a fact-finder could conclude that the post-filing documents were crafted (or, at the very least, that the actions described in the documents were taken) to support defendants' litigation position. Both the timing of these documents and the substance of certain documents could support such an inference.[19] The

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19. In a November 2005 e-mail, Wang Qi's writes:

> This act of deciding production or prices based on coordination is a kind of monopoly whatever the reasons. However, I believe we should not have any worry since the [Ministry] is a friend of the court in the lawsuit. If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, the government would take the foremost part of responsibility. After all, *we need to do many things a more hidden and smart way.*

(Emphasis added). Also, a December 2005 NEPG report states "must avoid strategies that would appear counter to sales growth and *thus speak not further about the antitrust lawsuit.* (Emphasis added).

above notwithstanding, some evidence from this period still warrants brief discussion.

A. Potential Change in Chinese Law

Although the record does not contain any governmental directives issued after the 2003 Announcement, one post-filing document suggests that the Chinese law governing vitamin C exports changed after the filing of the instant suit. According to the minutes of a November 16, 2005 Subcommittee meeting, at the meeting, Qiao Haili stated that: "Recently Premier Wen Jiabao had an instruction on the enhancement of industrial self-regulation. The Secretary 2d Bureau under the State Council had conducted an analysis aiming at VC, which also asked for resolving the legal status issue of the industrial self-regulation."[20] Neither Premier Wen Jiabao's "instruction" nor the Secretary's analysis is part of the record.

B. Evidence of Voluntariness

Despite the credibility questions surrounding all of the post-filing documents, it should be noted that certain post-filing documents continue to suggest voluntariness. For example, after defendants set a minimum price and agreed to a production shutdown at a May 2005 meeting, Wang Qi's notes remark that, "due to the damage caused by Weisheng last year, it is still an open question as to what extent the consensus made at the

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20. The copy of these minutes in the record includes redacted content both directly before and directly after this quotation.

meeting will be implemented. We should have a sober estimate of the situation." Also, a December 2005 NEPG report concerning marketing and sales strategy states: "Strengthen self-regulation in the VC industry, but don't rely completely on the 'gentlemen's agreements' of the [Chamber]."

C. Evidence Regarding the Chamber Compelling Agreements in the First Instance

Defendants contend that two post-filing documents evidence the Chamber directing the parties to agree on coordinated production shutdowns. Neither document, however, clearly supports that proposition.

First, defendants point to the minutes of a November 16, 2005 meeting, which defendants assert indicate that "that Qiao Haili of the Chamber was to follow up and determine with the 'Chairman of the Chamber' '[w]hether we should have a production shutdown.'" Although the minutes note that, at the meeting, Qiao Haili stated that the question of whether to conduct a shutdown should be discussed at a follow-up meeting, the minutes do not clearly state that the Chairman of the Chamber would decide this question. Moreover, a November 16, 2005 document authored by Wang Qi discussing the meeting casts doubt on defendants' interpretation of the minutes. This document suggests that JJPC had the ability not to join proposed shutdown if it so desired and explicitly states that the Chamber "once again put forward the

suggestion of coordinated termination of production."[21] (Emphasis added).

Second, defendants cite to a September 2006 internal NEPG report, which states that "various VC manufacturers in China will successively suspend production." This document, however, does not address what, if any, role the Chamber played in the formation of this shutdown agreement.

D. Minimum Price

As noted earlier, there is evidence of defendants making substantial sales below the minimum price during 2005 and 2006.

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21. This document also includes the following cryptic passage, discussing "government relations":

> We are reluctant to admit the fact that the [Chamber] will continue to be a major force in coordinating companies of this industry, particularly in a difficult situation. The role of the [Chamber] as the industrial association will be intensified rather than weakened in the future. Therefore, there is no need for us to go beyond [the] coordination of the [Chamber], which will do no good to our current or future work. The work of the [Chamber] will be supported by the Ministry of Commerce. We should not regard the coordination simply as authoritarianism of the [Chamber]. Not only does this passage raise questions about the voluntariness of defendants' post-filing agreements, but it also suggests, consistent with Qiao Haili's statement, that Chinese law governing vitamin C exports was in flux after the filing of the initial complaint in this case.

E. Use of Verification and Chop to Enforce Output Restrictions

Defendants cite to minutes from a December 2005 meeting indicating that defendants would inspect each other to ensure compliance with a production shutdown agreement and that "[i]f production is not suspended in accordance with the schedule, the Chamber of Commerce will stop issuing export verification and approval seals until the enterprise suspends its production."

There is also other post-filing evidence indicating that verification and chop was used to enforce output restrictions. Ning Hong testified that the Chamber would allocate a certain number of chops to each company and that the company could not exceed that amount. There are also post-filing documents that discuss using "the method of issuing export pre-authorization stamps in order to restrict the export volume."

V. Export Quotas

According to their interrogatory answers, defendants were subject to export quotas at various times since 1997.[22] However, defendants' answers are not entirely consistent as to when such quotas were imposed. Although no export

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22. Although the time period covered by defendants' answers regarding export quotas includes the 1997 Regime, the pre-filing period under the 2002 Regime and the post-filing period under that regime, defendants make no effort to explain, for example, the difference between quotas set under the 1997 Regime and those set during the post-filing period under the 2002 Regime.

quotas appear to have been in place in 2003, 2004 or 2005, export quotas were apparently re-instituted in June 2006.

(4)

INTERPRETING FOREIGN LAW AND DEFERENCE TO STATEMENTS BY FOREIGN GOVERNMENTS

Under Federal Rule of Civil Procedure 44.1, "[d]etermination of a foreign country's law is an issue of law." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998); *see also Kim v. Co-op. Centrale Raiffeisen-Boerenleenbank B.A.*, 364 F. Supp. 2d 346, 349 (S.D.N.Y. 2005). In determining foreign law, courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Disputes among experts regarding foreign law do not create issues of fact. *Rutgerswerke AG and Frendo S.p.A. v. Abex Corp.*, No. 93-cv-2914, 2002 U.S. Dist. LEXIS 9965, 2002 WL 1203836, at *16 (S.D.N.Y. June 4, 2002).

When a foreign government submits a statement regarding its law, courts have taken different approaches as to the weight that should be afforded to such statements.

Prior to the enactment of Rule 44.1, the Supreme Court held that such statements should be considered "conclusive." *United States v. Pink*, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942) (accepting as conclusive

declaration from Russian government that nationalization decree was intended to have extraterritorial effect); *see also Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919) (finding statement from Russian government that individual was authorized to act on behalf of government in entering assignment and release was "binding and conclusive in the courts of the United States against that government").

However, more recent authorities, including the Second Circuit and the Justice Department, have moved away from the view that a foreign government's position on its own law is conclusive and precludes any further inquiry.

The Justice Department's current position on this issue is that:

> As a general matter, the Agencies regard the foreign government's formal representation that refusal to comply with its command would [give rise to the imposition of penal or other severe sanctions] as being sufficient to establish that the conduct in question has been compelled, as long as that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law.
>
> * * * *

The Agencies may inquire into the circumstances underlying the statement and they may also request

further information if the source of the power to compel is unclear.

1995 Antitrust Enforcement Guidelines for International Operations (promulgated by the Dept. of Justice, April 5, 1995)("Antitrust Guidelines"), at § 3.32 & n. 94, available at http://www.justice.gov/atr/public/guidelines/internat.htm (last visited Sept. 1, 2011).

More importantly, in a recent decision, the Second Circuit held "that a foreign sovereign's views regarding its own laws merit-although they do not command-some degree of deference." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 92 (2d Cir. 2002) (adopting the Indonesian's government's position regarding the ownership, under Indonesian law, of majority of funds in dispute, but reaching a contrary position regarding a portion of the funds). In denying defendants' motion to dismiss, Judge Trager, relying on *Karaha Bodas*, concluded that the Ministry's amicus brief was "entitled to substantial deference, but would not be taken as conclusive evidence of compulsion," particularly given that the plain language of the documentary evidence submitted by plaintiffs directly contradicted the Ministry's position. Judge Trager also noted that, unlike *Karaha Bodas*, both *Pink* and *American Can* were decided prior to the promulgation of Rule 44.1.

Defendants contend that I should not follow *Karaha Bodas* because it did not discuss *Pink* or *American Can*. Defendants also point out that the defendant's brief

in *Karaha Bodas* did not cite to either case and never even argued that "conclusive" deference was required. I disagree.

Karaha Bodas is the law of the Circuit, particularly given that, as Judge Trager noted, one subsequent panel has explicitly relied on *Karaha Bodas* on this issue. *See Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008), *vacated on other grounds*, 130 S. Ct. 3318, 176 L. Ed. 2d 1216 (2010). Also, as Judge Trager noted, *Karaha Bodas* was decided after the promulgation of Rule 44.1. *Cf. Riggs Nat. Corp. & Subsidiaries v. C.I.R.*, 163 F.3d 1363, 1368, 333 U.S. App. D.C. 371 (D.C. Cir. 1999) (citing Rule 44.1 and analogous Tax Court rule and noting the court's "hesitant[ance] to treat an interpretation of law as an act of state [under the act of state doctrine], for such a view might be in tension with rules of procedure directing U.S. courts to conduct a de novo review of foreign law when an issue of foreign law is raised").[23] Furthermore, although *Karaha Bodas* may accord less deference to a foreign government's statement than the Justice Department's position, this is merely a question of degree. *Karaha Bodas* and the Justice Department's position, which explicitly takes *Pink* into account, see Brief for the United States as Amicus Curiae Supporting

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23. One district court decision post-dating Rule 44.1 continued to apply *Pink*'s conclusive deference standard. *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1285-86 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977) (table case). However, that decision, which viewed the relevant inquiry as an "act of state" question, *id.* at 1281, did not discuss the potential impact of the Rule 44.1. *Compare Riggs*, 163 F.3d at 1368.

Petitioners, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, (No. 83-2004), 1985 WL 669667, at *23 ("*Matsushita* Amicus Br.") ("the [foreign] government's assertions concerning the existence and meaning of its domestic law *generally* should be deemed 'conclusive.' *United States v. Pink*, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942)") (emphasis added), both acknowledge that a foreign government's statement is not entitled to absolute and conclusive deference in all circumstances and that further inquiry behind that statement is permissible.

It must be noted that, for certain issues, the governmental directives contain language that contradicts the position taken by the Ministry and neither the Ministry nor Professor Shen address the problematic language. In such circumstances, I must consider the plain language of the governmental directives. Although I would consider the notion that an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law, I cannot ignore such plain language without some explanation as to why it should be disregarded.[24]

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24. In different circumstances, I may have requested that the parties and the Ministry further address these provisions. However, defendants and the Ministry have had more than ample opportunity to explain the relevant Chinese law. Notably, in the 2009 Statement, the Ministry's most recent submission, the Ministry elected not to discuss, or cite to, any specific governmental directives or Chamber documents.

Appendix C

(5)

DEFENDANTS' DEFENSES

I. Comity

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.
>
> *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95(1895).

As Judge Trager's opinion noted, often-cited decisions by the Ninth and the Third Circuits adopted various factors for courts to consider in determining whether to assert extraterritorial jurisdiction in an antitrust suit.[25] *Timberlane Lumber Co. v. Bank of America, N.T. and*

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25. The *Timberlane* factors are:

(1) Degree of conflict with foreign law or policy,

(2) Nationality or allegiance of the parties and the locations or principal places of businesses or corporations,

(3) Extent to which enforcement by either state can be expected to achieve compliance,

(4) Relative significance of effects on the United States as compared with those elsewhere,

(5) Extent to which there is explicit purpose to harm or affect American commerce,

(6) Foreseeability of such effect, and

(7) Relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The *Mannington Mills* factors are:

(1) Degree of conflict with foreign law or policy;

(2) Nationality of the parties;

(3) Relative importance of the alleged violation of conduct here compared to that abroad;

(4) Availability of a remedy abroad and the pendency of litigation there;

(5) Existence of intent to harm or affect American commerce and its foreseeability;

(6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

S.A., 549 F.2d 597, 614 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

However, the Supreme Court has not adopted these tests and their continuing validity (or at the very least their proper application) is unclear after the Supreme Court's decision addressing comity in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993), an antitrust suit against British reinsurers. "The only substantial question in *[Hartford Fire* was] whether 'there [was] in fact a true conflict between domestic and foreign law.'" *Id.* at 798 (citation omitted). The Court concluded that no such conflict exists when a defendant can comply with both United States and foreign law, "even where the foreign state has a strong policy to permit or encourage [the conduct that violates American law]." *Id.* at 799. The Court found no such conflict with British law as the defendants were not "required . . . to act in some fashion prohibited by the law of the United

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(7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

(8) Whether the court can make its order effective;

(9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

(10) Whether a treaty with the affected nations has addressed the issue.

States" and there was no claim "that their compliance with the laws of both countries is otherwise impossible." *Id.* The Court declined "to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.*

It is thus not clear that a comity analysis is still permitted in the absence of the type of true conflict envisioned by *Hartford Fire*. *See Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464, 478 (S.D.N.Y. 1997) (holding, in antitrust suit, that a true conflict under *Hartford Fire* is a threshold requirement for any comity analysis), *vacated on other grounds*, 157 F.3d 922 (2d Cir. 1998). However, even assuming that it were, any such analysis would focus exclusively on *Timberlane*'s other factors and would not consider China's encouragement and approval of defendants' price-fixing. As one commenter who strongly supports *Timberlane*'s expansive comity analysis has conceded, after *Hartford Fire*, "litigants are free to make comity arguments relying on the other factors outlined in the cases and the Restatements, but may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion."[26] Spencer

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26. Defendants' only response to *Hartford Fire* is a citation to the Justice Department's antitrust enforcement guidelines, which state that "[i]n deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies." Antitrust Guidelines § 3.2. The unsurprising fact that the Justice Department still considers these

Weber Waller, Antitrust and American Business Abroad (2009) § 6:21; *see also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996) (limiting comity analysis to remaining *Timberlane* factors after finding no conflict with foreign law or policy because the Korean design registration system at issue was not compelled by the Korean government).

Unless defendants' price-fixing was compelled by the Chinese government, dismissal on comity grounds would not be justified. Once *Timberlane*'s first factor is excluded from consideration, the instant case essentially becomes no different than any other worldwide price-fixing conspiracy by foreign defendants that includes the United States as one of its primary targets. Although this case could affect foreign relations, these foreign policy concerns stem directly from the degree of conflict between Chinese and American laws and policies.

II. Foreign Sovereign Compulsion

A. Overview

The defense of foreign sovereign compulsion . . . focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states . . . [and] recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's. 584 F.

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factors in exercising its prosecutorial discretion does not indicate that courts may, in direct contradiction to *Hartford Fire*, consider a foreign government's encouragement of conduct in a comity analysis.

Supp. 2d at 551. Although the Supreme Court in *Hartford Fire* did not explicitly discuss the foreign sovereign compulsion defense ("FSC defense") as a distinct doctrine or absolute bar to antitrust liability, the Court recognized that abstention on comity grounds may be warranted where compulsion creates a true conflict. Other courts have recognized compulsion as a distinct defense or as a "[a] corollary to the act of state doctrine," *Timberlane*, 549 F.2d at 606 (reasoning that "corporate conduct which is compelled by a foreign sovereign" is treated as "if it were an act of the state itself.").

In addition to fairness concerns, the FSC defense also acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments. Antitrust Guidelines § 3.32. The fact that a foreign government compels certain activity ordinarily indicates that the activity implicates its "most significant interests." *Matsushita* Amicus Br. at *21. Relatedly, the FSC defense also recognizes "that compelled conduct often raises foreign policy concerns that are primarily the province for the Executive Branch." Brief for the United States as Amicus Curiae Supporting Appellants, *Matsushita*, 1985 WL 669663, at *14-15; *see also Matsushita* Amicus Br. at *19.

The burden of proof for the FSC defense is on defendants. *Matsushita* Amicus Br. at 22; *cf. Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000) (addressing act of state doctrine).

According to the Justice Department, for the FSC defense to apply, the defendant must face "the imposition of penal or other severe sanctions" for refusing to comply with the foreign government's command. Antitrust Guidelines § 3.32. The Justice Department has also recognized the FSC defense to be applicable where refusal to comply with the command of a foreign sovereign would be futile.[27]

"Of course, the [FSC] defense is not available for conduct going beyond what the foreign sovereign compelled." Weber Waller, Antitrust and American Business Abroad § 8:23 n.6; *see also Mannington Mills*, 595 F.2d at 1293 ("One asserting the defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct"); *cf. United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231, 259 (N.M. 1980) (explaining that even if defendant was compelled to participate in cartel by the Canadian government, the act of state doctrine would not bar inquiry into whether defendant "went beyond the scope of the cartel as the Canadian Government defined it").

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27. In *Matsushita*, a predatory pricing case that went up to the Supreme Court, the Japanese government represented that if the defendants had failed to follow the government's direction to enter into minimum price agreements and a customer division regulation, the government would have invoked its power to unilaterally impose those export restrictions. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, *Matsushita*, 1985 WL 669665, at 13a-14a. The United States' amicus brief found this sufficient to establish the FSC defense. *Matsushita* Brief at *24-25. The Supreme Court, however, did not reach the FSC defense. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

B. Animal Science and the FSC Defense

In *Animal Science*, the court addressed the FSC defense, concluding that the only pertinent question in determining the applicability of the FSC defense was whether the defendants were compelled to abide by the minimum prices set through the relevant Chamber.[28] 702 F. Supp. 2d 320, *vacated on other grounds*, 654 F.3d 462, 2011 U.S. App. LEXIS 17046, 2011 WL 3606995 (3d Cir. Aug. 17, 2011). The court considered the question of "how the minimum prices came about" to be irrelevant. *Id.* at 438 & n. 119. According to the court, the plaintiffs were challenging the defendants' decision to follow the minimum price and the defendants' "coining" of that minimum price was "a ministerial task entirely different from the challenged conduct." *Id.* at 438. The court also reasoned that a person (be they a legislator, agency official or company in a regulated industry) who participates in "coining" a law or regulation is not exempted from the compulsion of the resulting law or regulation. *Id.* at 424-25, 438.

I disagree with the approach taken in *Animal Science*. If the defendants in *Animal Science* were not compelled

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28. The defendants in *Animal Science*, Chinese magnesite producers, were not governed by verification and chop. However, they were still subject to export quotas, which were set by the Ministry, and a minimum price. The court's compulsion analysis focused on the minimum price, which was determined through meetings of the producers convened by the relevant Chamber and then registered with, and enforced by, the Ministry. Selling below the minimum price could result in penalties, including fines, loss of quota allotment and revocation of export license.

to reach minimum price agreements in the first instance, the fact that such agreements were enforced would not appear sufficient to establish the FSC defense. It should be noted that, in a footnote, the court in *Animal Science* went on to explain that even if the question of "how the minimum price came about" was relevant, based on the Ministry's statements in the instant case, the defendants in *Animal Science* had a mandatory obligation to engage in deliberations about the minimum price and that "an attempt to filibuster would cause a substantial punishment." *Id.* at 438 n. 119. However, as explained below, I disagree with the Ministry's position. Furthermore, the court in *Animal Science* did not address whether, given the discretion that the defendants had to set the level of the price, prices set above the minimum level necessary to avoid anti-dumping suits and below-cost pricing would be beyond the scope of any potential compulsion.

III. The State Action Doctrine

Where a state enacts programs regulating domestic commerce, the state action doctrine provides antitrust immunity for the regulated private parties who participate in such programs. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 1726, 85 L. Ed. 2d 36 (1985). To qualify for immunity under the state action doctrine, the anticompetitive restraint must be "clearly articulated and affirmatively expressed as state policy" and "the State must actively supervise any private anticompetitive conduct." *Id.* at 1727. The state action defense applies to state policies that "permit, but do

not compel, anticompetitive conduct by regulated parties." *Id.* at 1728; *see also Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

Defendants argue that even if they fail to qualify for the FSC defense, the state action doctrine should be applied to regulatory programs enacted by foreign governments. One recent decision has rejected this argument. *In re Transpacific Passenger. Air Transp. Antitrust Litig.*, No. C 07-5634, 2011 U.S. Dist. LEXIS 49853, 2011 WL 1753738, at *16 (N.D. Cal. May 9, 2011). Also, in its amicus brief to the Supreme Court in *Matsushita*, the Solicitor General distinguished the FSC defense from the state action defense and suggested that the state action defense should not apply in the foreign context. *Matsushita* Amicus Br. at 20-22.

It is unnecessary to determine whether the state action doctrine should be available to defendants because they have not even attempted to establish the active supervision prong. After plaintiffs raised this issue in their opposition brief, defendants responded that, as matter of comity, they should not have to meet the strict requirements of the state action doctrine. As discussed previously, absent compulsion, dismissal on comity grounds is not warranted.[29]

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29. One commentator has suggested that a defendant exercising authority delegated by a foreign government should be entitled to an even broader defense than is available under the state action doctrine. Weber Waller, Antitrust and American Business Abroad § 8:20. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, a subsidiary of the defendant was delegated authority by the Canadian

IV. Act of State Doctrine

A. Overview

The act of state doctrine is a judge-made rule of federal common law. Antitrust Guidelines § 3.33. The "doctrine directs United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of U.S., foreign, or international law) of official action by a foreign sovereign performed within its own territory." *Riggs Nat. Corp. & Subsidiaries v. C.I.R.*, 163 F.3d 1363, 1367, 333 U.S. App. D.C. 371 (D.C. Cir. 1999). Although the doctrine was originally based on considerations of international comity, more recent decisions have focused on the doctrine "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400,

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government to act as the exclusive purchasing agent for the Canadian vanadium market. 370 U.S. 690, 706-07, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). The subsidiary used that authority to exclude a seller, which competed with the defendant, from the Canadian market. In refusing to apply the act of state doctrine, the Supreme Court explained that the subsidiary's exclusion of the competing seller was neither compelled nor approved by the Canadian government. *Continental Ore* "leaves open the possibility that delegated conduct shown to have been consistent with the standards and purposes of the foreign regulatory program will not be treated as harshly as purely private conduct." Antitrust and American Business Abroad § 8:20. However, the Supreme Court and the Second Circuit have yet to recognize such a far-reaching defense and I decline to do so here.

110 S. Ct. 701, 107 L. Ed. 2d 816 (1990) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)). "The act of state doctrine is not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike.'" *Id.* at 406 (quoting *Sabbatino*, 376 U.S. at 427). Defendants bear the burden of proof to justify application of the act of state doctrine. *Bigio*, 239 F.3d at 453.

The factual predicate for application of the act of state doctrine only exists where the suit "requires the Court to declare invalid, and thus ineffective as a rule of decision for the courts of this country, the official act of a foreign sovereign." *W.S. Kirkpatrick*, 493 U.S. at 405 (citation and internal marks omitted). Thus, "[a]ct of state issues only arise when a court must decide–that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign." *Id.* at 406. However, even where the factual predicate for the act of state doctrine is met, courts, applying a balancing approach, can refuse to apply the doctrine if the policies underlying the doctrine do not justify its application. *Id.* at 409.

B. Act of State Doctrine and Compulsion

Defendants argue that the act of state doctrine is applicable to the instant case based on the following logic: because defendants' actions were compelled by the Ministry, defendants' acts are "effectively" the acts of the Ministry—thus, any challenge to defendants' conduct is, in essence, a challenge to official actions taken by the Ministry. Although this makes sense—assuming

defendants' conduct was compelled—it is not clear how proceeding under the act of state doctrine, as opposed to the related FSC defense, adds anything to defendants' case. There are, however, two other ways in which the act of state doctrine may be applicable to instant suit.

C. Inquiry into the Motivation of Foreign Governments and Officials

Defendants argue that the act of state doctrine does not require compulsion, citing the Antitrust Guidelines. Antitrust Guidelines § 3.33 ("[a]lthough in some cases the sovereign act in question may compel private behavior, such compulsion is not required by the doctrine"). This section of the Antitrust Guidelines suggests that the relevant agencies consider the act of state doctrine to be applicable to certain suits where a court would be required to inquire into the motivation of the foreign state for taking an action.[30]

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30. In asserting that the act of state doctrine does not require compulsion, the Antitrust Guidelines cite to *Timberlane*, 549 F.2d at 606-08. In *Timberlane*, the plaintiff alleged that, as part of a scheme to put the plaintiff out of business, the defendants filed suit in Honduran courts and foreclosed on security interests that they held on the plaintiffs' assets. Invoking the act of state doctrine, the defendants relied on an earlier decision that had applied the doctrine to bar a suit alleging that the defendants induced a foreign government to assert fraudulent claims over the scope of its territorial waters in order to interfere with the plaintiff's oil concession. *Timberlane*, 549 F.2d at 608 (discussing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972)). These appear to be the type of non-compelled scenarios

The Second Circuit has held that the act-of-state doctrine bars inquiry into a foreign government's motivations for taking a specific action. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977) (dismissing suit that could not be resolved without determining that, but for defendants' actions, the Libyan government would not have seized and nationalized plaintiff's assets); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987) (citing *Hunt* and dismissing suit where defendants allegedly manipulated the Colombian government into implementing discriminatory cargo laws that injured plaintiff).

However, I believe that these decisions have been overruled by *W.S. Kirkpatrick*. *See* Antitrust and American Business Abroad § 8:11 ("The reasoning of [*Buttes*] and *Hunt* regarding the motivations of the foreign states has not survived [*W.S. Kirkpatrick*]."); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (post-*W.S. Kirkpatrick* decision refusing to apply act of state doctrine where defendants allegedly agreed to make payments in exchange for price controls on Venezuelan tobacco that injured domestic tobacco growers).[31]

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envisioned by the Antitrust Guidelines, which indicate that "Agencies may refrain from bringing an enforcement action based on the act of state doctrine" where the "restraint on competition arises directly from the act of a foreign sovereign, such as the grant of a license, award of a contract, expropriation of property, or the like." Antitrust Guidelines § 3.33.

31. Given *W.S. Kirkpatrick*, it is not clear why the Antitrust Guidelines take the position that inquiries into the motivations of

In any event, in the instant case, no inquiry into the motivation of the Ministry in promulgating the relevant governmental directives is necessary. This is because plaintiffs have not pursued the potential argument that the FSC defense is inapplicable because defendants procured those directives.[32] Rather than contending that *Hunt* and *O.N.E. Shipping* were overruled by *W.S. Kirkpatrick*, plaintiffs simply distinguish those decisions on the ground that they both involved situations where the foreign government took an action that harmed the plaintiff. Because plaintiffs argue that verification and chop did not involve any compulsion, they reason that it was defendants' voluntary actions, rather than the sovereign acts of the Chinese government, that harmed them.[33]

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a foreign state are still barred by the act of state doctrine. The explanation may be that, for purposes of making enforcement decisions, the Antitrust Guidelines take a more expansive view of the act-of-state doctrine than the one adopted by the Court in *W.S. Kirkpatrick*. Notably, in *W.S. Kirkpatrick*, the Justice Department, as an amicus, advocated such a position, which was ultimately rejected by the Court. 493 U.S. at 408-09.

32. Although plaintiffs do not pursue this argument, in their 56.1 statement and the facts section of their brief, plaintiffs contend that the verification and chop system "was adopted by agreement among [d]efendants," citing to the statement from the April 2001 Subcommittee meeting that "because the manufacturers have not agreed on the enforcement mechanisms of the verification and chop system, it remains a major question whether this price limit can be enforced effectively." This and other evidence in the record suggests that defendants and Chinese officials were co-equal players in the regime governing vitamin C, and indeed, it may be that defendants were the leaders, in designing that regime.

33. The act of state doctrine would not have prevented plaintiffs from arguing that the FSC defense should be inapplicable

Appendix C

D. Inquiry into Foreign Officials' Compliance with and Enforcement of Foreign Law

Courts have invoked the act of state doctrine to preclude inquiry "behind" sovereign acts. This can occur where a party contends that a sovereign act is in derogation of the sovereign's own laws. The doctrine has also been applied where a party seeks to establish that a foreign government has failed to comply with and enforce its own laws.

Defendants rely on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), where the plaintiff, in an attempt to rebut an assertion of the FSC defense, sought to establish that an oral order given by a Venezuelan official was not binding and compulsive because, under Venezuelan law, the official had

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because defendants procured the alleged compulsion. The court in *Interamerican Refining Corp. v. Texaco Maracaibo. Inc.*, 307 F. Supp. 1291, 1297 (D. Del. 1970), suggested that the FSC defense should not be recognized in such circumstances. I am sympathetic to this view. Certainly, the fairness concerns behind the FSC defense would no longer be applicable where the compulsion was procured by the defendant. Moreover, where, as in the instant case, defendants enthusiastically embrace a legal regime that encourages, or even "compels," a lucrative cartel that is in their self-interest, any inquiry into the applicability of the FSC defense is artificial. In such circumstances, the presence or absence of compulsory measures is seemingly irrelevant, for they are never going to be needed. To borrow a metaphor used by Mao Tse-Tung, the concept of "coercion" in this context is a paper tiger. Ultimately, it is unnecessary to rely on the above points to resolve this motion because I conclude that the 2002 Regime did not involve any compulsion.

no authority to issue the order and such oral orders were not binding. Through the affidavit of a Venezuelan attorney, the plaintiff sought to establish this both, as a legal matter, and, somewhat confusingly, as a factual matter at trial, *id.* at 1301 ("[the plaintiff] urges that it be permitted to show at trial that the order was not binding because oral and without legal authority"). Although the court explained that "whether or not [the Venezuelan] official 'ordered' certain conduct is an evidentiary question," the court rejected plaintiff's arguments based on the act of state doctrine, which precluded the court from examining the validity of the order under Venezuelan law.[34] *Id.* The court added that whether the act was legal or "compulsive" under the laws of Venezuela is not a proper inquiry for either a court or a jury and that "[o]nce governmental action is shown, further examination is neither necessary nor proper. *Id.* Because plaintiffs here do not argue that the governmental directives establishing the 2002 Regime are invalid under Chinese law, *Interamerican* is largely irrelevant to the instant motion.

West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987), is arguably more relevant to the instant motion. In *West*, the Ninth Circuit held that the act of state doctrine bars inquiry into whether foreign officials are failing to

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34. The plaintiff in *Interamerican* argued that its evidence of Venezuelan law, as well as other facts, "refute[d] the existence of [the alleged] order." Pl.'s Br. in Opp. to Def.'s Motions for Summ. Judg., *Interamerican*, No. 2808 (May 28, 1969). However, the plaintiff addressed this argument in a single, brief, paragraph and made no effort to explicitly explain how its evidence of Venezuelan law should have been considered in making this factual determination.

enforce their own laws. In order to resolve a securities suit involving certificates of deposit issued by a Mexican bank, the court had to determine whether the Mexican banking regulatory scheme (which included supervision by the government, capital and reserve requirements, and other safeguards) "virtually guaranteed repayment in full." *Id.* at 827. The plaintiffs argued the regulatory regime only met this standard "on paper" because, in practice, Mexican officials neither complied with nor enforced these laws. *Id.* Invoking the act of state doctrine, the Ninth Circuit rejected this argument, holding that courts "may not examine the actual operations of the regulatory system to the extent that such inquiry would directly implicate the failure (whether willful or negligent) of officers of the foreign state to enforce their own laws." *Id.* at 828. The court went on to note that "[a]s a matter of comity, we presume that Mexican officials are acting in a manner consistent with the requirements of Mexican law."[35] *Id.*

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35. The viability of *West* after *W.S. Kirkpatrick* is questionable. Although *West's* rationale for invoking the act of state doctrine is not entirely clear, its primary justification appears to have been that a challenge to the effectiveness of Mexican officials would embarrass the Mexican government and "intrude upon [Mexico's] coequal status." *Id.* at 827-828. However, *W.S. Kirkpatrick* made clear that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." 493 U.S. at 409. The court in *West* also relied on *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406-07 (9th Cir. 1983). However, as noted earlier, "motivation" decisions such as *Clayco*, which invoked *Buttes* to bar inquiry into

ANALYSIS

To resolve defendants' motion for summary judgment, I must: (1) determine what deference, if any, should ultimately be accorded to the Ministry's interpretation of Chinese law; (2) determine what, if any, consideration should be given to the factual record, which defendants contend is irrelevant to the instant motion; (3) interpret Chinese law. These three inquiries are, to a certain degree, interrelated.

At the outset, I am compelled to note that the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of "law" as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system. To give but one example, the regulatory system governing vitamin C not only relies on consensus-based decision making, but also accords defendants wide, and possibly unbounded, discretion in setting the price and output levels for vitamin C.

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whether bribes paid to a foreign government resulted in the plaintiff losing an oil concession, appear to no longer be viable after *W.S. Kirkpatrick*. Given the above concerns about *West*, I also question the continuing viability of the Second Circuit's broad dicta in *O.N.E. Shipping*, asserting that "[i]n essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into *the acts and conduct of the officials of the foreign state*, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." 830 F.2d at 452 (emphasis added).

In addition, defendants' own expert asserts that oral directives are an important component of Chinese regulatory law and admits that "Chinese governmental control is a quite different process from what takes place in other countries." Of course, foreign legal regimes that are markedly different from our own can still, in their own unique ways, compel a defendant's conduct. However, in some circumstances, asserting a claim of compulsion under a foreign regime that so differs from our own concept of law can be akin to trying to fit a round peg into a square hole. Close ties and cooperation between government and industry does necessarily equal compulsion, particularly in situations where compulsion appears unnecessary.

For the reasons explained below, I respectfully decline to defer to the Ministry' interpretation of Chinese law and conclude, based on what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the Subcommittee and the Chamber—that the 2002 Regime did not compel defendants' conduct. This interpretation is further supported by the factual record. In interpreting Chinese law, I find it appropriate to consider the factual record concerning how Chinese law was enforced and applied.[36] In addition, as explained

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36. I have concluded that it is appropriate to look to the factual record to help interpret the governmental directives at issue. There is also a strong argument that consideration of the factual record is necessary because any oral directives by officials of the Ministry and the Chamber appear to be an essential part of the Chinese law governing vitamin C. According to Professor Shen, "it is normal for [regulatory documents promulgated by the Ministry] to be expressed

below, to the extent that the factual record contains any disputed issues of fact that are relevant to the task of interpreting Chinese law, such disputes are for the Court to resolve.

I. Deference to the Ministry's Statements

Except for the Ministry's explanation of the relationship between the Ministry and the Chamber,[37] I respectfully

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at a level of generality that then must be applied and implemented in specific contexts." This application and implementation "frequently" occurs through "oral directions, even including telephone calls." I also note that defendants themselves suggest that coordination was only required when the Chamber "direct[ed] the manufacturers to cooperate as to prices or output." If that were the case, an inquiry into what the representatives of the Chamber communicated to the defendants would be necessary to resolve the FSC defense. Of course, the above discussion assumes that the act of the state doctrine would be equally applicable to both oral directives and written law, a conclusion as to which I harbor some doubt.

37. According to the Ministry, "specific chambers of commerce, when authorized by the Ministry to regulate, act in the name, with the authority, and under the active supervision, of the Ministry." In sum, the Ministry asserts that the Chamber is "the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China," including vitamin C.

> Plaintiffs challenge the Ministry's position arguing that: (1) the 1991 Measures granting the Ministry supervisory authority over the Chamber were abolished and, under subsequent laws, the Chamber was treated no differently than other social organizations in China; and (2) representations made by other Chambers indicate that the Chamber is a non-governmental organization that is independent of the government.

decline to defer to the Ministry's interpretation of Chinese law. As explained below, the Ministry fails to address critical provisions of the 2002 Regime that, on their face, undermine its interpretation of Chinese law. "[T]he support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas" "[w]here a choice between two interpretations of ambiguous foreign law rests finely balanced." *Karaha Bodas*, 313 F.3d at 90. However, that is not the case here, particularly given the Ministry's failure to address key provisions of the 2002 Regime.[38]

I note that three significant flaws in the Ministry's 2009 Statement render it particularly undeserving of deference. First, in contrast to the Ministry's amicus brief, which at least attempted to explain the regulatory system governing vitamin C exports by citing to, and discussing, specific governmental directives and Chamber documents,

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Neither of these arguments is persuasive. At the very least, the Chamber was delegated authority, under the 2002 Regime, to grant and deny chops, which, in some circumstances, were required for export. In addition, the 1991 Measures and 1994 Notice (both of which were still in force during the relevant period), as well as the 2003 Chamber Charter, all establish that the Ministry held a special supervisory role over the Chamber. However, none of these points, standing alone, establish compulsion or require dismissal under the act of state doctrine.

38. The United States' submissions in the WTO proceeding relied on the amicus brief and statements submitted by the Ministry in the instant litigation. The Executive Branch, however, has not communicated to this Court that the Ministry's statements should be accorded heightened deference based on the Executive Branch's reliance on those statements in the WTO proceeding.

the 2009 Statement does not cite to any of those sources to support its broad assertions about the regulatory system governing vitamin C exports. This omission is compounded by the 2009 Statement's declaration that self-discipline regulation required vitamin C exporters "to coordinate among themselves on export price and production volume *in compliance with China's relevant rules and regulations.*" Of course, this simply begs the question of what did the relevant rules and regulations require—an issue that the 2009 Statement conspicuously avoids by not citing to any governmental directives or Chamber documents.[39] Second, as discussed *infra*, the 2009 Statement contains numerous ambiguous terms and phrases, particularly with regard to the penalties under self-discipline. Third, although there are clearly some differences between the 1997 Regime and 2002 Regime, the 2009 Statement makes no attempt to distinguish between the two regimes. The 2009 Statement does not read like a frank and straightforward explanation of Chinese law. Rather, it reads like a carefully crafted and phrased litigation position.

China's representation to the WTO that it gave up "export administration . . . of vitamin C" as of January 1, 2002 is further reason not to defer to the Ministry's position. Although many of the public statements cited by the Stern Report are, as the Ministry asserts, simply

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39. Professor Shen's attempt to define "self-discipline" is also circular and unhelpful. He asserts that "'[s]elf-discipline' means that all industries shall maintain import and export order in accordance with laws, regulations and rules and shall not conduct operation in violation of regulations regardless of national interest."

general descriptions of the current status of China's economy and China's transition toward a market economy, the Ministry makes no attempt to explain China's representations that it gave up export administration of vitamin C, which appear to contradict the Ministry's position in the instant litigation.

Moreover, although not dispositive on the question of the appropriate deference to be afforded to statements by foreign governments, when the alleged compulsion is in the defendants' own self-interest, a more careful scrutiny of a foreign government's statement is warranted. Similarly, in interpreting Chinese law, I cannot ignore the obvious fact that a compulsory regime is unlikely to be present where the defendants' economic interest is in accordance with the allegedly compelled conduct.

Finally, the factual record contradicts the Ministry's position.[40] In sum, all of the points above suggest that the Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny

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40. As defendants correctly point out, some of the documentary evidence in the record is consistent with the Ministry's interpretation of Chinese law and explanation of compulsion. This includes evidence documenting that: (1) defendants voted on proposals and reached agreements through consensus; (2) such agreements were reached at meetings with the Chamber and "under the coordination of [the Chamber],"; and (3) defendants failed to reach consensus on certain occasions. However, not only is the above evidence also consistent with an absence of compulsion, but, as explained *infra*, there are other facts in the record, such as those surrounding Weisheng's violation of the shutdown agreement in 2004, that directly contradict the Ministry's position.

rather than a complete and straightforward explanation of Chinese law during the relevant time period in question. Although the Ministry encouraged defendants' cartel and now fervently desires that defendants be dismissed from this suit, those policy preferences do not establish that Chinese law "required" defendants to follow their anti-competitive predilections.

Like the Ministry, Professor Shen also fails to address important provisions of the 2002 Regime that contradict his interpretation of Chinese law. I therefore cannot accept his conclusion that "the implementation of the verification and chop mechanism . . . did not in any way change the level of control that the government maintained over the vitamin C industry." Not only does Professor Shen fail to address key provisions of the 2002 Regime, he maintains that "[t]he mechanism through which [China's policy requiring coordination] was to be accomplished was not the key point," which suggests that he views the details of the 2002 Regime as essentially irrelevant.

II. Interpretation of Chinese Law Based on the Traditional Sources of Foreign Law

A. Applicability of the 1997 Regime to Defendants' November 2001 Agreement

Once the 2002 PVC Notice took effect on May 1, 2001, all of defendants' subsequent conduct (including their continuing compliance with the agreement reached in November 2001) was governed by the 2002 Regime. Moreover, although the 2002 PVC Notice did not formally

take effect until May 1, 2002, I will assume that the 2002 PVC Notice governed defendants' conduct in the interim period between the abolishment of the 1997 Regime on March 21, 2002 and the formal institution of the 2002 PVC Notice.

There is, however, a question as to what directives governed the remainder of defendants' conduct regarding the agreement they reached in November 2001. That agreement concerned the coordinated export price that was to take effect on January 1, 2002 and total export volumes for 2002. The 1997 Notice was still formally in effect from January 1, 2002 through March 21, 2002. However, China represented to the WTO that as of January 1, 2002, it gave up "export administration . . . of vitamin C." This representation coincides with the repeal, on January 1, 2002, of the 1992 Interim Regulations, which appear to have established the foundation of the export licensing and quota regime in place at the time. Notably, like the 1997 Regime, the 1992 Interim Regulations also subjected vitamin C to export licensing and quotas. Given the above, I conclude that the 1997 Regime did not govern defendants' compliance with the November 2001 agreement. Thus, the 1997 Regime is irrelevant to the instant motion, except to give context to the 2002 Regime.

B. Suspension Provision

The Suspension Provision in the 2002 PVC Notice provides that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the

approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs]." Neither the Ministry nor Professor Shen address this provision, which I interpret as granting defendants the unilateral authority to suspend verification and chop.[41]

The Suspension Provision is open to two potential interpretations. Under either interpretation, it is clear that the Chamber and Customs could not suspend verification and chop without the approval of the members of the Subcommittee (*i.e.*, the defendants). However, this provision is ambiguous as to whether defendants had the unilateral power to suspend verification and chop. The term "may" could be read to indicate that even if the members agreed to suspend verification and chop, the Chambers and Customs could, but were not required to, suspend it. The most plausible interpretation of this provision is that the Subcommittee had the unilateral power to suspend verification and chop. It would make little sense if the Subcommittee was granted the power to veto a decision of the Chamber and Customs regarding the suspension of verification and chop, but did not have the unilateral power to decide whether to suspend verification and chop in the first instance.

Although the 2003 Announcement does not contain a similar explicit suspension provision, I construe the 2003 Announcement as granting defendants the same power under the 2003 Announcement. Nothing in the record

41. There is no evidence that the 1998 Opinions, the text of which is not in the record, contained a similar suspension provision.

indicates that the 2003 Announcement's extension of verification and chop was intended to alter the substance of the regime in any way. In fact, both the Ministry and Professor Shen appear to view the 2002 PVC Notice and the 2003 Announcement as essentially interchangeable.

Moreover, even if the absence of an explicit suspension provision in the 2003 Announcement were material, under the 2003 Announcement defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance. Although the 2003 Procedure's requirement that the Chambers "verify the submissions based on the industry agreements [and relevant regulations]" indicates that the contracts must comply with the relevant industry agreements, neither the 2003 Announcement nor the 2003 Procedures explicitly direct defendants to reach any agreements in the first instance. During any period in which no industry agreements were in effect, it can be assumed that either a chop would be granted to any contract submitted to the Chamber irrespective of the contract price or that the requirement for chops would simply be abandoned.

The interpretation above is, standing alone, sufficient reason to deny summary judgment.[42] Moreover, this interpretation renders moot any potential act of state concerns because, under this interpretation, inquiries into the enforcement of the 2002 Regime and defendants' role in promulgating the 2002 Regime are unnecessary to resolve the instant motion.

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42. Given this interpretation, it is not clear what would be left for the jury to determine at trial, particularly in regards to the pre-filing period.

Although I could end my analysis here, there are further reasons why denial of summary judgment is warranted. For one thing, as certain points below illustrate, even if Chinese law did involve some compulsion, summary judgment would still be denied because Chinese law assuredly did not compel all of defendant's illegal conduct.

C. Applicability of Verification and Chop to Industry-Agreed Output Restrictions

I conclude that, as a matter of Chinese law, in order to receive a chop under the 2002 PVC Notice and 2003 Announcement, an export contract was only required to comply with the industry-agreed minimum price ("Price Interpretation"). Compliance with industry-agreed output restrictions was not required to receive a chop. Because verification and chop did not require compliance with industry agreements regarding output, it can also be assumed that the 2002 Regime did not compel such agreements in the first instance.

Nothing on the face of the governmental directives indicates that compliance with output restrictions was required to receive a chop. The 2002 PVC Notice explicitly focuses on price and the 2003 Announcement is ambiguous regarding the applicability of verification and chop to output restrictions.

The 2002 PVC Notice explicitly states that "the relevant chambers" were required to submit to Customs "information on industry-wide negotiated prices" and

repeatedly refers to "price review." By contrast, the 2002 PVC Notice makes no mention of industry-agreed output restrictions.[43] Moreover, if all agreements, including agreements regarding output restrictions, were to be enforced through verification and chop, it is not clear why the 2002 Charter includes a provision for "security deposit[s]" to ensure compliance with industry agreements. Furthermore, because the apparent purpose of the 2002 Regime was to avoid dumping suits and below cost-pricing, *see* discussion *infra*, it is not surprising that the 2002 Regime was limited to compliance with a minimum price.

Although the term "industry agreements" in the 2003 Procedures is broad enough to also include agreements on output restrictions, this ambiguity does not favor either potential interpretation. In addition, as noted earlier, nothing in the record indicates that the substance of verification and chop differed between the 2002 PVC Notice and the 2003 Announcement. The only provision in the 2003 Announcement that could be read to suggest that compliance with output restrictions was also required to receive chops is the 2003 Procedures' direction that chops be affixed on the contract "where the prices and quantities are specified." However, in light of the plain language of the 2002 PVC Notice, this ambiguous provision is insufficient to establish that verification and chop required compliance with output restrictions.

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43. Similarly, the 1998 Opinions cited by Professor Shen only appear to have required compliance with a minimum price.

Moreover, some of the Ministry's own statements support the Price Interpretation. According to the Ministry, under the 2002 PVC Notice, "[i]f the [contract] price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed . . . a 'chop.'" The Ministry similarly has acknowledged that the "basis" of the verification and chop system "was a process of 'industry-wide negotiated prices.'"

Neither the Ministry nor Professor Shen offers any compelling explanation undermining the Price Interpretation. First, I recognize that, in addition to stating that the Chamber would affix a chop "[i]f the [contract] price was at or above the minimum acceptable price set by coordination through the Chamber," the Ministry's amicus brief also states that, under the 2002 PVC Notice, the Chamber "'verified,' i.e., approved, the contract price and volume." The Ministry, however, provides no citation to support this assertion. Perhaps the Ministry is referring to the 2003 Procedures' requirement that chops be affixed on the contract "where the prices and quantities are specified." Yet, even if the Ministry had explicitly cited to the 2003 Procedures as support, that ambiguous provision is insufficient in light of the other evidence in the record outlined above.

Second, the 2009 Statement, which does not discuss any of the specific governmental directives, fails to address any of the issues raised above. Third, although Professor Shen suggests that the 2003 Procedures require compliance with both a minimum price and output restrictions in order to receive a chop, Professor

Shen never addresses the limited language of the 2002 PVC Notice that refers only to "industry-wide negotiated prices" and "price review." Moreover, as discussed *infra*, both Professor Shen and the Ministry completely ignore the 2002 Charter

D. Potential Penalties for Non-Compliance with Self-Discipline

In arguing that the FSC defense is applicable, the Ministry's amicus brief, citing to the 1997 Notice and 1997 Charter, relies, *inter alia*, on the fact that defendants: (1) were required to be members of the Subcommittee; and (2) would not have been able to export vitamin C if they failed to participate in "price-setting" activities. The Ministry, however, does not explain how Subcommittee membership was required under the 2002 Regime and 2002 Charter or how defendants' export right would be affected if they failed to participate in price-setting and output-setting activities under the 2002 Regime. Thus, even assuming that, under "self-discipline," defendants were supposed to "consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies," there was no penalty for failing to do so.

Preliminarily, I note that the absence of potential penalties or other mechanisms to compel defendants to reach price and output agreements is not surprising. As I mentioned earlier, there is no need to compel defendants

to do what makes them the most money.[44] It would actually be somewhat surprising to see a compulsory regime where the defendants' interests and the government's goals are aligned. Although the FSC defense would presumably still be applicable in such circumstances provided that a compulsory framework were, in fact, present, as a matter of common sense, such a regime is simply much less likely when the alleged compulsion is in the defendants' economic self-interest. *Cf.* Mitsuo Matshushita & Lawrence Repeta, Restricting the Supply of Japanese Automobiles, Sovereign Compulsion or Sovereign Collusion?, 14 Case W. Res. J. Int'l L. 47, 63 (1982) ("[T]he defendant's decision to act in a manner contrary to its monetary interests should be accorded great weight in determination whether that act was compelled.").

Turning to the instant record, certain governmental directives and Chamber documents state, on their face, that membership was no longer required under the 2002 Regime. The 2003 Procedures provide that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters." Similarly, the May 2002 Agreement

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44. Although it may have been unnecessary to compel defendants to reach price and output restriction agreements, a government-backed mechanism for ensuring compliance with those agreements would not be superfluous. Such an enforcement mechanism would attempt to counteract each defendant's individual incentive to cheat, which is a problem in almost any cartel. However, the presence of a compulsory enforcement mechanism would not establish that defendants' agreements were compelled in the first instance.

indicates that "[a] company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies)." Moreover, none of the governmental directives and Chamber documents requiring membership remained in force under the 2002 Regime. The 1997 Notice was abolished and the 1997 Charter was replaced by the 2002 Charter, which describes the Subcommittee as a "a self-disciplinary industry organization jointly established on a *voluntary basis* by those Chamber of Commerce members which conduct import and export of vitamin C." (Emphasis added). In addition, the 2002 Charter does not include the provision in the 1997 Charter providing that "[t]he Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member."

The Ministry ignores the above provisions, which, on their face, contradict the Ministry's position and the Ministry's argument as to why the FSC defense is applicable.

The Ministry's submissions only briefly address the specific governmental directives underlying the 2002 Regime. In discussing the applicability of the FSC defense, the amicus brief's only reference to the 2002 Regime is in relationship to the enforcement of industry agreements. Similarly, the amicus brief's discussion of the 2002 Regime indicates that the 2002 Regime "changed the way in which *compliance* with the Chamber's 'coordination' was *confirmed* by abolishing [export licenses] and establishing [verification and chop]." (Emphasis added).

The Ministry does not address the fact that membership in the Subcommittee was no longer required and never discusses the 2002 Charter.[45] The 2009 Statement, which does not cite to any specific governmental directives, does not address these issues. Although Professor Shen asserts that membership was required under the 2002 Regime, he does not provide any citation to support that proposition and never addresses the contrary provisions in the governmental directives and Chamber documents. Similar to the Ministry's amicus brief, Professor Shen cites only to the 1997 Charter and never discusses the 2002 Charter.

Given the above, it is clear that even if a company's membership in the Subcommittee was revoked (or the company was never a member), that company could still export vitamin C.

Neither the Ministry nor defendants make any effort to explain how defendants' participation in price-setting and output-setting is compelled given that membership in the Subcommittee is no longer required. Although the 2009 Statement conclusorily asserts that persons engaged

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45. The Ministry's amicus brief was less than straightforward in its presentation of the 1997 Charter. The amicus brief did not mention the 2002 Charter and implied that the 1997 Charter was still controlling under the 2002 Regime. Notably, Judge Trager's decision appears to have assumed that the 1997 Charter was still operative throughout the relevant period. At oral argument on the motion to dismiss, the Ministry's counsel conceded that the "whole regulatory regime" under the 1997 Notice was superseded by the 2002 PVC Notice, but never mentioned the 2002 Charter.

in self-discipline are "well aware that they are subject to penalties" for "noncompliance with self-discipline," including "forfeiting their export right," the Ministry never explains: (1) why such persons are "well aware" of this fact; (2) what "forfeiting their export right" means in the context of the 2002 Regime; (3) how a forfeiture of export rights would be accomplished under the 2002 Regime; or (4) what the other potential penalties are.[46] The 2009 Statement also indicates that the Chamber was delegated "necessary enforcement measures" and that the Chamber had the power to "penalize," but the Ministry never identifies those "enforcement measures" or explains the Chamber's power to "penalize" under the 2002 Regime. Similarly, Professor Shen also maintains, without any explanation, that under the 2002 Regime, "[d]efendants' right to export will be forfeited if they refuse to participate in . . . coordination."[47] All of the above

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46. On its face, the 2002 Regime would only appear to deny a defendant its "right" to export if the defendant submitted a contract that failed to abide by the relevant industry agreements and was, thus, ineligible to receive a chop. However, nothing in the governmental directives indicates that chops were to be denied if defendants failed to reach agreements in the first instance.

47. At one point, Professor Shen suggests that compulsion arises from the fact that regulated companies "still have significant state ownership, the national and regional governments play an ongoing role, and top managers and executives generally owe their business positions to political appointment." However, defendants do not rely on this specific assertion and the Ministry does not advance a similar argument. Moreover, not only do I doubt, as a general matter, that this would be sufficient to trigger the FSC defense, but Professor Shen's sweeping assertion is clearly insufficient to establish that these specific defendants faced the possibility of coercion through

assertions are insufficient to establish the FSC defense. *See* Antitrust Guidelines § 3.32 (explaining that the FSC defense requires "penal or other severe sanctions" and that the Agencies will regard a foreign government's statement regarding compulsion to be conclusive if "that representation contains sufficient detail to enable the Agencies to see precisely how the compulsion would be accomplished under local law").

The only provision in the 2002 Regime that could potentially establish compulsion is the 2003 Procedures' "same treatment" provision, which states that "[f]or V&C Applications made by non-member exporters, the Chambers shall give them the *same treatment* as to member exporters." (Emphasis added). This provision suggests that although non-members could export under the 2002 Regime, non-members may have still been required to abide by the minimum price (and possibly also the output restrictions) set by the Subcommittee. Moreover, non-members would not appear to have any input into the restrictions that they would be required to follow—no defendant would want the amount of vitamin C it could export to be determined, unilaterally, by its competitors.

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these informal channels. Not only would this require a fact-intensive inquiry, but the factual record indicates that the type of compulsion suggested by Professor Shen was utterly absent here. As discussed *infra*, with regard to Weisheng's breach of a June 2004 shutdown agreement, there is no documentary evidence suggesting even the possibility that the informal levers of control noted by Professor Shen would be employed.

However, neither the Ministry nor Professor Shen nor defendants rely on the "same treatment" provision to establish compulsion. In any event, the above concerns notwithstanding, this provision is insufficient to establish compulsion.

First, non-members did not have to abide by output restrictions imposed by the Subcommittee. As discussed earlier, the 2002 Regime only requires compliance with the minimum price in order to receive a chop. As such, the "same treatment" provision would not have compelled defendants to reach agreements regarding output restrictions. In addition, although the May 2002 Agreement states that the "export quantity [of non-members] needs to be confirmed by other companies," this provision was never incorporated into the final 2002 Charter.

Second, even if non-members were required to abide by both price and output restrictions imposed by the Subcommittee, the absence of a membership requirement still leaves open the question of what would happen if all the members simply resigned from the Subcommittee. If this occurred, the non-members could still export and there would be no price or output restrictions that they would be required to follow. The only way the FSC defense would still be applicable in such circumstances is if I were to simply assume that the Ministry would directly impose restrictions that the non-members would be required to follow. However, the notion that the threat of the Ministry's direct intervention was hanging over the 2002 Regime appears to conflict with China's representations

to the WTO that it gave up "export administration . . . of vitamin C." Moreover, neither defendants nor the Ministry focus their compulsion argument on the possibility of the Ministry intervening and directly imposing price and output restrictions. Instead, the Ministry and defendants focus on the Chamber's power to penalize.

Given the above, I conclude that none of the provisions in the 2002 Regime, including the "same treatment" clause, would compel defendants to reach agreements in the first instance.

E. Relevance of the WTO Proceeding and the 1996 Interim Regulations

In the WTO Proceeding, the WTO panel concluded that China imposed minimum export price requirements on all of the raw materials at issue. Those raw materials were under the auspices of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters ("CCCMC"). The WTO panel found that the CCCMC's charter "authorized" and "directed the CCCMC to set and coordinate export prices" for those raw materials and that the resulting minimum prices were enforced through two governmental directives: (1) a licensing provision that is irrelevant to the instant suit; and (2) the 1996 Interim Regulations, which "imposed penalties on exporters that fail to set prices in accordance with the coordinated export prices."[48] WTO Panel Report

48. Although the complainants in the WTO Proceeding also argued that verification and chop was used to enforce the minimum price for one of the raw materials at issue, the WTO panel declined

¶¶ 7.1026, 7.1063. The WTO panel concluded that these provisions "amount[] to a requirement to coordinate export prices for the raw materials at issue." *Id.* ¶ 7.1064. The WTO panel also determined that "actions undertaken by the CCCMC with respect to minimum export price requirements . . . are attributable to China." *Id.* ¶ 7.1096.

The WTO panel's conclusions do not alter my interpretation of Chinese law. Notably, none of the parties in the WTO Proceeding ever argued that the measures in dispute did not impose a minimum price. Rather, China, the only party that had an incentive to take such a position, argued that: (1) all of the measures at issue relevant to a minimum price requirement were repealed prior to the panel's establishment on December 21, 2009; and (2) even if it did impose minimum prices, that would not constitute a violation for the purposes of the WTO.

In addition, the WTO panel did not discuss whether any of the CCCMC documents that it cited included provisions stating that membership in the CCCMC or its product-specific subcommittees were voluntary and that companies could export without holding such membership. As explained earlier, those provisions in the governmental directives and Chamber documents at issue here are critical to the question of whether defendants' agreements were compelled in the first instance.

Also, although the 1996 Interim Regulations appear to have been in effect during both the 1997 Regime and

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to address verification and chop because its repeal in May 2008 put it beyond the scope of the WTO panel's inquiry. WTO Panel Report ¶ 7.1054.

the 2002 Regime, neither the Ministry nor Professor Shen rely on those regulations to establish compulsion.[49] Professor Shen's report never even mentions the 1996 Interim Regulations.[50] In its amicus brief, the Ministry cites to the 1996 Interim Regulations merely as background in attempting to explain the goals of the 1997 Regime. In fact, the Ministry's counsel asserted at oral argument that there was no compulsion under the 1996 Interim Regulations: "[The 1997 Notice] is what establishes the license. So what you have in [the 1996 Interim Regulations] is the beginning of a, 'you shall,' but there is no mechanism yet. There is no hammer. There is no compulsion yet really."

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49. The complainants in the WTO Proceeding also relied on the Ministry's 2009 statement discussing self-discipline as well as two CCCMC "coordination measures," which are irrelevant to the instant suit. The WTO panel did not base its decision on these additional documents, finding them outside of "the Panel's terms of reference." WTO Panel Report ¶ 7.1028. The panel, however, still considered these documents in "assessing the operation of China's alleged [minimum price] requirement" and interpreting the 1996 Interim Regulations. *Id.* ¶ 7.1032. According to the panel, the 2009 Statement "reveal[s] that . . . parties would be subject to penalties for failure to participate in price coordination." *Id.* ¶ 7.1035. The panel, however, did not address the various deficiencies in the 2009 Statement that I identified earlier.

50. The fact that Professor Shen does not rely on the 1996 Interim Regulations is particularly noteworthy given that he wrote an article entitled "A Rational Read of the '(Interim) Provisions of the Investigation and Punishment of Improper Low-price Export Conduct,'" which appears to be about the 1996 Interim Regulations.

Furthermore, because the 1996 Interim Regulations cover all export products and the 2002 PVC Notice and 2003 Announcement address a limited number of specific products, one can assume in the event of any conflict the more specific directives would govern. For example, if defendants invoked the Suspension Provision in the 2002 PVC Notice, it is doubtful that they would have still been subject to potential penalties under the 1996 Interim Regulations. Moreover, China's assertion to the WTO panel that it ceased enforcing the 1996 Interim Regulations at the same time that it repealed verification and chop indicates that these directives should all be interpreted in light of each other.

Even if I were to conclude that the 1996 Interim Regulations involved compulsion and required defendants to set, and abide by, a minimum price, summary judgment would still be denied. The 1996 Interim Regulations only concern a minimum price and are irrelevant to the defendants' agreements regarding output restrictions. Moreover, as discussed below, the 1996 Interim Regulations only address concerns of below-cost pricing and anti-dumping.

F. Any Potential Compulsion was Limited to Avoiding Anti-dumping and Below-Cost Pricing

Even assuming that the 2002 Regime and the 1996 Interim Regulations provided potential sanctions and required defendants to agree on and abide by a minimum price (and possibly also output restrictions), I am not

convinced that the Chamber or the Ministry would have intervened through compulsory measures if defendants, in exercising their discretion, had simply set the minimum price and output levels at a point that would have avoided anti-dumping suits and below-cost pricing. Setting prices above that level exceeded the scope of any compulsion and, therefore, would not be immunized by the FSC defense.

On their face, the relevant directives do not indicate that defendants were required to set prices above a level that would have avoided anti-dumping suits and below-cost pricing. The 1996 Interim Regulations explicitly discuss below-cost pricing and appear to have been intended to avoid anti-dumping suits. Moreover, the directives underlying the 2002 Regime are vague regarding objectives other than avoiding dumping suits.

In addition, the "self-destructive competition" that the Ministry and Professor Shen claim concerned the government also appears to refer to below-cost pricing and avoiding anti-dumping. The 1998 Opinions cited by Professor Shen addressed below-cost pricing by instituting prices for certain domestic products based on average costs in the industry. Similarly, a law review article cited in Professor Shen's discussion of self-discipline indicates that the notion of "vicious competition" in the export context also refers to below-cost pricing. In discussing China's Anti-Monopoly Law, which directs trade associations to "strengthen the self-discipline of industries . . . [and] protect[] the order of market competition," the article explains that:

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> In the legislators' eyes, there are two kinds of competition: the good and the bad. 'Good competition' refers to competing on quality and variety of product/services; *'bad competition' ('vicious competition') refers to below-cost pricing. The legislators believe the latter type is a race to the bottom and harms Chinese enterprises, especially those in the business of exporting raw materials*; and they further believe trade associations ought to promote 'self-discipline' among competitors and avoid such price wars.

Yong Huan, Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law, 75 Antitrust L.J. 117, 129-30 (2008-2009) (emphasis added). In addition, before the WTO panel, China asserted that "it designated [the Ministry] to coordinate export prices [for the raw materials at issue] to minimize the possibility of injurious dumping of Chinese exports by individual exporters." Panel Report ¶ 7.998.

Finally, neither the Ministry nor Professor Shen explicitly state that the Chamber or the Ministry would have intervened if defendants had set restrictions at the minimum levels necessary to avoid anti-dumping suits and below-cost pricing. In fact, the Ministry's counsel represented that, although the Ministry was concerned with dumping and wanted the companies to achieve "sufficient profit margins" in order to ensure the "stable development of the industry" and "full employment," the relevant profit margins were determined by the companies

themselves and the Ministry "really didn't care" what those margins were.

III. The Factual Record and Interpreting Chinese Law

A. Legal Standard

Under Rule 44.1, courts have substantial discretion to consider different types of evidence in determining foreign law. Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."). Although courts often rely on sources such as expert testimony and treatises in determining foreign law, Rule 44.1 does not limit courts to such evidence. *See United States v. First National Bank of Chicago*, 699 F.2d 341, 344 (7th Cir. 1983) (holding that there was "no doubt" that it was appropriate for district court to consider, *inter alia*, affidavit of bank manager in determining that Greek statute at issue was in effect during the relevant period and applied to foreign banks). In one recent decision, a court, in interpreting an ambiguous Brazilian regulation, relied on the fact that the plaintiff "offered no evidence that . . . Brazilian authorities ever prosecuted, or expressed an intent to prosecute, civilly or criminally, any person or institution for the conduct [the plaintiff asserted] was illegal in Brazil."[51] *Gusmao v. GMT Group,*

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51. Even if *West* were still good law and barred inquiry into whether foreign officials failed to enforce their own laws, *West* would not prevent consideration of the type of evidence considered in *Gusamo*. A court can presume that foreign officials were acting in a

Inc., No. 06-cv-5113, 2009 U.S. Dist. LEXIS 37092, 2009 WL 1174741, at *23 (S.D.N.Y. May 1, 2009).

A difficult question, however, arises when this type of evidence involves disputed facts. This was not an issue in *Gusamo* and no decisions appear to have addressed this question. Because courts are tasked with determining foreign law as a question of law,[52] courts, rather than juries, should resolve any disputed facts relevant to interpreting foreign law.

A determination of foreign law is, like choice of law analysis, a preliminary matter to be resolved by the court. Therefore, any disputed facts underlying that determination must also be resolved by the court. *See Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 742-43 (7th Cir. 2008) (holding, in the context of choice of law analysis, that district court should resolve the factual issue of whether defendant was a legitimate corporation operating out of

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manner consistent with the requirements of foreign law and construe ambiguous foreign law accordingly. In such circumstances, the type of evidence considered in *Gusamo* would not directly implicate a failure by foreign officials to enforce their own law.

52. Although no courts appear to have directly addressed the issue, determination of foreign law by judges does not appear to violate the Seventh Amendment. *See* Arthur R. Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 684 (1967) ("When the federal experience is examined against the backdrop of the early English and state court decisions, the irresistible conclusion is that there is no historic tradition of submitting foreign-law issues to the jury that is of sufficient clarity to warrant a present-day federal judge to hold that he is bound to do so as a constitutional matter.").

Illinois); *Cf.* Fed. R. Evid. 104 advisory committee's note, 1972 Proposed Rule ("To the extent that [inquiries into admissibility] are factual, the judge acts as a trier of fact."). Courts first determine the applicable law before cases can be given to the jury.[53]

Admittedly, in contrast to the Seventh Circuit, the Second Circuit held forty years ago that the jury, rather than the court, should make factual findings necessary to resolve choice of law questions. *See Marra v. Bushee*, 447 F.2d 1282 (2d Cir. 1971). However, that decision has been criticized, *see Chance v. E. I. Du Pont De Nemours & Co., Inc.*, 57 F.R.D. 165, 168-69 (E.D.N.Y. 1972), and I do not believe that the Second Circuit would extend it beyond its facts. As Judge Weisheng explained in *Chance*, because judges determine what the substantive law is, "[t]heory suggests that the facts predicate to a choice of law decision are generally for the judge rather than the jury." *Id.* at 168. That rationale is equally applicable to determinations of foreign law. Even assuming that the Second Circuit would continue to adhere to the holding of *Marra* in the choice of law context, for the reasons persuasively outlined by Judge

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53. The fact that, in the instant case, it may ultimately be unnecessary to instruct the jury regarding foreign law does not alter the analysis. As a general matter, the resolution of foreign law is a preliminary determination that must first be decided by the court before the case can go to trial before a jury. Notably, in the choice of law context, there can be situations where resolution of the critical facts underlying the choice of law analysis would be outcome determinative and, irrespective of how those facts are resolved, a grant of summary judgment would necessarily follow. Yet, the appropriate fact-finder for choice of law issues would surely not vary depending on the specifics of individual cases.

Weisheng in *Chance*, it is doubtful that the Second Circuit would extend the rationale of *Marra* beyond that case.

Finally, it cannot be overlooked that in this case I am not merely tasked with interpreting Chinese law, but also with determining the appropriate deference to be accorded to the statements of the Ministry. I do not think that the two can be separated as a practical matter, and the latter is clearly inappropriate for resolution by a jury. The resolution of factual disputes relevant to that inquiry is assuredly a function of the court and not the jury.

B. Preliminary Issues

1. Change in Chinese Law

I conclude, as a question of foreign law under Rule 44.1, that all evidence regarding post-filing conduct must, given the current record, be deemed irrelevant to the task of interpreting the Chinese law that was applicable during the pre-filing period. At a November 16, 2005 meeting, Qiao Haili referenced an instruction by "Premier Wen Jiabao" regarding "the enhancement of industrial self-regulation" as well as "an analysis" conducted by the "Secretary 2d Bureau under the State Council" that focused on vitamin C and "asked for resolving the legal status issue of the industrial self-regulation."[54] Because

54. Qiao Haili's statement is arguably hearsay. However, in making a determination of foreign law under Rule 44.1, I am not bound by the Rules of Evidence. Fed. R. Civ. P. 44.1; *see also Exxon Corp. and Affiliated Companies v. C.I.R.*, 63 T.C.M. (CCH) 2067 (T.C. 1992) (finding witness' testimony regarding telephone conversation

neither the Ministry nor defendants have offered this "instruction" or "analysis" into the record, I am unable to determine the specific impact this "instruction" or "analysis" had on Chinese law. However, I infer that that these changes were made in response to the instant suit — such an inference is particularly appropriate in light of the redactions surrounding these statements in the meeting minutes. Given this gap in the record, which defendants and the Ministry have failed to fill, I decline to rely on any post-filing conduct in interpreting the Chinese law that governed during the pre-filing period. In addition, the fact that, in November 2005, the Chinese government was attempting to "resolv[e] the legal status ... of the industrial self-regulation," a concept upon which defendants and the Ministry place great reliance, further suggests that Chinese law did not compel defendants' conduct, particularly in the pre-filing period.

In addition to the minutes of the November 2005 meeting, there is also other evidence in the record indicating that Chinese law fluctuated during the post-filing period. An e-mail authored by Wang Qi that discusses the November 2005 meeting indicates an evolving role for the Chamber. Also, the re-institution of export quotas in 2006 indicates a further potential change in Chinese law.

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in which Saudi Arabian Minister clarified scope of government price restriction to be "admissible under [tax court analogue to Rule 44.1] in ascertaining the scope of the restriction, for which its contents may be used in support of the truth thereof").

2. Miscellaneous Factual Findings

As an initial matter, I find it appropriate to address three statements in the pre-filing documentary record that could potentially be construed as affirmative evidence of compulsion. First, I find that the Ministry's statements in the fall of 2001 to the Chamber regarding the threatened anti-dumping suits do not indicate that defendants were compelled to reach agreement in November 2001 and to abide by that agreement. Second, I find that the summary of the December 2001 meeting from the Chamber's website does not constitute evidence of compulsion. Although this document may be susceptible to multiple interpretations, I interpret it to mean that the Chamber was announcing that defendants were able to reach, and implement, an agreement without the government's intervention because the government was no longer involved under the 2002 Regime and the Chamber was expressing its pleasure that defendants, freed from any constraints imposed by the 1997 regime (including the government imposed licenses and export quotas), were able to reach, and abide by, this agreement on their own. In making this finding, I note the absence of any testimony from the Chamber employee who drafted the summary at issue explaining its meaning. Third, I find that the statement by the representative of the Ministry at the April 2001 Subcommittee was not a compulsory order and, more importantly, even if it was, it is insufficient to indicate compulsion under the 2002 Regime given that the Ministry was clearly playing a different role under the 2002 regime. Moreover, even if this statement did indicate compulsion under the 2002 Regime, it does not speak to the question of whether

restrictions limited to combating below-cost pricing and anti-dumping would have been sufficient to satisfy the Ministry.

Although these factual findings and the additional findings below support my interpretation of Chinese law, I note that, based solely on the more traditional evidence of foreign law discussed earlier, I would reach the same conclusions even if I did not consider the factual record.[55]

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55. Plaintiffs cite to a decision from the European Court of First Instance addressing anti-dumping duties imposed by the European Union ("EU") against an exporter of Chinese glyphosate. Case T-498/04, *Zhejiang Xinan Chemical Industrial Group Co. Ltd v. Council of the European Union ("Zhejiang Xinan")*, 2009 ECJ EUR-Lex LEXIS 529 (June 17, 2009). Glyphosate is also subject to verification and chop under the 2002 PVC Notice and 2003 Announcement. In order to decide whether China should be treated as a market economy under the relevant dumping laws, the court in *Zhejiang Xinan* had to determine whether there was significant state interference in export prices. In arguing that no such interference existed, the Chinese exporter offered evidence showing, *inter alia*, that: (1) the "floor price" under verification and chop was merely a non-binding "guide" price established on the initiative of the exporters to combat anti-dumping concerns; and (2) after the guide price system was abandoned at a meeting in 2003, contracts were still subject to the "stamping procedure" by the relevant chamber so that it "could collect annual statistical information." The EU did not challenge the exporter's evidence on these points and based its case almost exclusively on the fact that, under verification and chop, the Chinese government granted the relevant chamber the power to refuse to grant a chop for contracts that were lower than the floor price. Although I do not rely on *Zhejiang Xinan* in interpreting Chinese law, I note that the position taken by the Chinese exporter and the evidence it apparently offered in support of its position are generally consistent with my interpretation of Chinese law and similar to the factual record here.

C. Factual Findings and Specific Interpretations of Chinese Law

1. Applicability of Verification and Chop to Industry-Agreed Output Restrictions

The Price Interpretation outlined earlier is strongly supported by the factual record. First, it is undisputed that, in early 2003, the Chamber distributed an official notice listing the "export prices of commodities reviewed by Customs and agreed by the industry for obtaining an export pre-authorization stamp from the Chamber." (Emphasis added). The notice does not refer to (and includes no field for) any type of output or quantity restrictions for vitamin C or any of the other commodities subject to verification and chop. Notably, Professor Shen makes no attempt to explain this notice.

Second, the circumstances surrounding Weisheng's violation of a shutdown agreement in 2004 also indicate that verification and chop was not intended to enforce production shutdown agreements. This incident is highly probative as it is the only breach of output restrictions during the pre-filing period. I find, as a factual matter, that: (1) this shutdown agreement was not enforced through verification and chop; (2) Weisheng was not punished, in any way, for its breach; and (3) the only reason Weisheng proposed a new shutdown agreement was, as Wang Qi's report explicitly states, "because their production line had problems." Not only is there a complete absence of any statements in the documentary evidence suggesting that the shutdown agreement would

be enforced through verification and chop, but, after Weisheng's violation, Kong Tai stated that he believed that the possibly of Weisheng participating in the new shutdown agreement "was not great." Wang Qi's deposition testimony regarding the absence of any penalty provisions for breaches in the shutdown agreement also indicates that the production shutdown was not enforced through verification and chop—if it had been, specific penalty provisions in the shutdown agreement would not have been necessary. The Price Interpretation is further supported by an NEPG document that discusses the June 2004 shutdown agreement and indicates that defendants viewed the mechanism for controlling prices as distinct from the mechanism for restricting output.

Weisheng's breach also indicates that production shutdown agreements were not compelled in the first instance. Even if there were some explanation as to why the shutdown agreement was not enforced, Kong Tai's statement that the possibility of Weisheng agreeing to participate in the new shutdown agreement "was not great" indicates that neither the Chamber nor the Ministry would have intervened if Weisheng had simply refused to agree to the revised shutdown agreement.

In light of the evidence above, I reject, as incredible and conclusory, the deposition testimony of defendants' employees asserting that Weisheng was penalized by the Chamber and that the Chamber required Weisheng to agree to the revised shutdown agreement.[56]

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56. Although defendants cite to only limited portions of the factual record, even if defendants had relied on all of the deposition

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The evidence discussing the use of verification and chop to enforce defendants' November 2001 agreement does not alter my conclusion that verification and chop was not used to enforce output restrictions. This evidence refers to "price reviews" and never explicitly states that the industry-agreed output restrictions would be enforced through verification and chop.

Finally, I note that the post-filing re-institution of export quotas in 2006 further supports the Price Interpretation. The re-institution of export quotas makes little sense if verification and chop was supposed to enforce output restrictions.

2. Potential Penalties for Non-Compliance with Self-Discipline

The factual record also confirms that there were no material penalties under the 2002 Regime for failing to reach agreements in the first instance. If the threat of membership revocation under the 2002 Regime was

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testimony of their employees, I would reject that testimony. For example, I would reject the deposition testimony of defendants' employees to the extent that they suggest that verification and chop was used to enforce any output restrictions in the pre-filing period. Moreover, based on the evidence concerning Weisheng's breach, the other evidence of voluntariness in the pre-filing documentary evidence and the absence of any affirmative evidence of compulsion in those documents, I would also reject the deposition testimony of defendants' employees asserting that the agreements they reached during the pre-filing period stemmed from compulsory orders from the Chamber. In addition, much, if not all, of this testimony is conclusory.

sufficient to compel defendants' conduct, then Kong Tai would not have stated that it was unlikely that Weisheng would agree to participate in the new shutdown agreement. This incident also indicates that, even when a majority of the members of the Subcommittee wanted to compel one holdout member to reach agreement, they were powerless to do so.

Additionally, it is notable that none of defendants' employees have asserted that the Chamber threatened to revoke Subcommittee membership in order to compel defendants to reach agreements. Rather, defendants' employees claim, in unconvincing testimony, that the Chamber would compel defendants to reach agreement by threatening to withhold chops or export quotas.

In short, "self-discipline" does not involve coercion—as the term "self-discipline" suggests on its face, defendants were engaged in consensual cartelization.

3. Applicability of the 1997 Regime to Defendants' November 2001 Agreement

The factual record supports the conclusion that defendants' compliance with the agreement reached in November 2001 was not governed by the 1997 Regime. One document indicates that when defendants reached agreement in November 2001, they did so under the new legal framework established by the 2002 Regime:

> Analysis from persons within the industry was that the enterprises were able to sit down together at this particular time because VC

> prices had reached rock bottom, and no one could sustain a further slide; the next reason was, *because the country had opened up the commercial products business from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation.*

(Emphasis added). Moreover, the factual record also suggests that the November 2001 agreement was only enforced under the 2002 Regime. As one documents notes, "[t]he [Ministry] and [Customs] actively supported this effort to pre-verify and sign VC product types, requiring the companies to file with [the Chamber] prior to export."

4. Suspension Provision

None of the underlying facts are directly relevant to interpreting the Suspension Provision. There is no evidence that defendants invoked the Suspension Provision over the objections of the Chamber or that the Chamber prevented defendants from suspending verification and chop when defendants so desired. However, the general evidence of voluntariness in the record is, at the very least, consistent with my interpretation of the Suspension Provision.

5. Potential Compulsion and Avoidance of Anti-dumping and Below-Cost Pricing

There is evidence in the record suggesting that, even if the 2002 Regime involved some compulsion, the Chamber and the Ministry would have only compelled

defendants' conduct if anti-dumping suits and below-cost pricing were threatened. One Weisheng document notes that "because the international market has turned for the better considerably when compared with the situation in early 2002, *the willingness and actual effectiveness of various manufacturers to cooperate will be lower than the days when the market had a difficult time.*" (Emphasis added). Although I interpret this document as indicating that all of defendants' agreements were voluntary, if the 2002 Regime did, as a matter of Chinese law, involve some compulsion, I would interpret this document to mean that when the market was not "ha[ving] a difficult time" defendants could reach agreements, but were not required to do so.

It is also notable that, during the pre-filing period, the only Subcommittee meeting attended by a representative of the Ministry addressed dumping concerns.

IV. The Post-Filing Period

Although there appear to have been changes to Chinese law during the post-filing period—changes that are a sufficient reason to distinguish it from the pre-filing period—defendants have still failed to establish compulsion, as matter of Chinese law, during this time. Defendants have not provided me with the "instruction" and "analysis" referenced by Qiao Haili at the November 2005 meeting. Defendants have also not provided any explanation for the re-institution of export quotas in 2006.

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In addition, the factual record does not indicate that Chinese law compelled defendants' conduct during the post-filing period. Although I question the credibility of much of defendants' post-filing evidence, the November 16, 2005 document authored by Wang Qi, which suggests that the Chamber's role was evolving along with the changes in Chinese law, does not appear to have been crafted to serve defendants' litigation position. However, my interpretation of the ambiguous phrases in this document lead me to conclude that, even in November 2005, defendants were still not compelled to reach agreement, particularly regarding output restrictions. Much of this document suggests voluntariness, not compulsion. Even Wang Qi's discussion of "government relations" does not indicate the compulsion necessary to trigger the FSC defense. Rather, this discussion suggests a complex relationship between defendants, the Chamber and the Ministry that, given the evolving changes in Chinese law, was still being sorted out. Although Wang Qi notes that the Chamber "will continue to be a major force in coordinating companies" and that "go[ing] beyond [the] coordination of the [Chamber]" could have some negative consequences, his e-mail suggests that the latter action was, nonetheless, still a potential option. Moreover, it is not clear that the potential negative repercussions of such action would rise to the level necessary to constitute compulsion.

I conclude that Chinese law did not compel defendants' conduct in the post-filing period. Therefore, summary judgment must also be denied as to the post-filing period.

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CONCLUSION

For the reasons explained above, defendants' motion for summary judgment is denied.

SO ORDERED.

/s/
BRIAN M. COGAN
U.S.D.J.

Dated: Brooklyn, New York
September 1, 2011

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED NOVEMBER 6, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-mdl-1738 (DGT)

IN RE VITAMIN C ANTITRUST LITIGATION

November 6, 2008, Decided
November 6, 2008, Filed

MEMORANDUM AND ORDER

TRAGER, J.

Plaintiffs in this case allege that defendants, Chinese corporations that manufacture and sell vitamin C,[1] formed an illegal cartel to fix prices and limit supply for exports of vitamin C, including those to the United States. Plaintiffs bring this action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16. Defendants now move to dismiss, on the grounds that their price-fixing activities were compelled by the Chinese government.

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1. Plaintiffs have filed a second amended complaint adding two defendants that do not manufacture vitamin C. Defendants have moved to dismiss the second amended complaint.

Appendix D

Background

The following facts, which are drawn from the complaints,[2] are assumed to be true for purposes of this motion to dismiss.

China began producing vitamin C in the late 1950s, and by 1969 its scientists had developed a two-stage fermentation process to manufacture vitamin C, resulting in a significant cost advantage compared to European producers. China began employing this technology commercially in the 1980s. Chinese vitamin C manufacturers were able to overcome an early reputation for poor product quality, and now supply a full range of vitamin C products at premium prices. Most sales of vitamin C are of bulk ascorbic acid.

In the early 1990s, European manufacturers F. Hoffmann LaRoche, Ltd., Merck KgaA, and BASF AG and the Japanese company Takeda Chemical Industries, Ltd. dominated the worldwide vitamin C market. From 1990 to 1995, these companies conspired to suppress competition and fix prices for vitamin C. They were sued in *In re Vitamins Antitrust Litigation*, MDL No. 1285, Misc. No. 99-0197 (D.D.C.) (Hon. Thomas F. Hogan). Competition from Chinese manufacturers of vitamin C undermined this early conspiracy during the 1990s, until it reportedly disbanded in late 1995.

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2. There are multiple complaints in this consolidated multi-district litigation action, but all recite essentially the same background facts.

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During 1995, it was reported that thirteen Chinese manufacturers of vitamin C met and agreed to form their own cartel to limit production of vitamin C to stabilize prices. This attempt at market control reportedly failed. From the end of 1995, world vitamin C prices slumped and were cut in half by early 1996. By 1997, there were as many as 22 competitors in the Chinese vitamin C manufacturing market. Strong competition by Chinese competitors during this period allowed the Chinese to drive European manufacturers from the market. By the end of the 1990s, the reduction in vitamin C prices and other factors resulted in industry consolidation in China to four major manufacturers, all of which are defendants in this case - Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome"), Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("Jiangsu Jiangshan"), Northeast Pharmaceutical Group Co. Ltd. ("NEPG") and Weisheng Pharmaceutical Co. Ltd. ("Weisheng") (collectively, the "defendant manufacturers").

The price of vitamin C remained relatively low in 2001, by which time Takeda had withdrawn from the market and sold its manufacturing capacity to BASF. Merck and Roche also announced their intention to withdraw from the vitamin C market. BASF announced that it would halt its new production line in Takeda, Japan. By 2001, defendants had captured approximately 60 percent of the worldwide market for vitamin C. Currently, defendants control 82 thousand metric tons, or approximately 68 percent, of the worldwide production capacity for vitamin C.

Appendix D

According to the complaints, beginning in December 2001, defendants and their co-conspirators formed a cartel to control prices and the volume of exports for vitamin C. At a meeting of the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China (the "Association") in December 2001, defendants and the Association reached an agreement for Chinese manufacturers of vitamin C in which they agreed to control export quantities and raise prices. The cartel members agreed to restrict their exports of vitamin C in order to create a shortage of supply in the international market. Specifically, the cartel members agreed to "restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically." The complaints further allege that the agreements of the cartel members were facilitated by the efforts of their trade association.

According to the complaints, the formation of the cartel in December 2001 led to price increases of vitamin C in the United States from approximately $2.50 per kilogram in December 2001 to as high as $7 per kilogram in December 2002. Defendant China Pharmaceutical reported in its 2003 annual report that average prices during 2002 rose from $3.20 per kilogram to $5.90 per kilogram, an 84 percent increase. China Pharmaceutical also allegedly reported that gross profit margins for its vitamin C production were 60.2 percent in 2002, an increase of 28.1 percent.

Plaintiffs allege that together, defendants' sales constitute approximately 60 percent of the worldwide

vitamin C market and "virtually 100 percent of the manufacturers who can produce vitamin C for a cost below $4.50 to $5 per kilogram." Plaintiffs acknowledge that non-cartel members BASF and DSM control 30 to 40 percent of the worldwide market for vitamin C, but note that the European manufacturers have higher manufacturing costs for vitamin C than Chinese manufacturers.

The complaints allege that following the collusive price increases in 2002, during 2003 the combination of the cartel's supply restrictions and increases in world demand for vitamin C - attributable in part to the outbreak of SARS in Spring and Summer of 2003 - allowed the cartel to achieve prices as high as $15 per kilogram in April 2003. By the third quarter of 2003, however, cartel members began reducing prices to increase their sales. According to the complaints, despite the price cuts, prices remained substantially above competitive levels.

Plaintiffs allege that the Association called an "emergency meeting" in late November or December 2003 to address the price cutting, which was attended by representatives of each of the defendants. At the meeting, the Association discussed with defendants how they would rationalize the market and limit the production of vitamin C to increase prices.

In December 2003, defendants and members of the Association also met at the annual China Exhibition of World Pharmaceutical Ingredients, where they devised plans to rationalize the market and limit production levels and increase prices. The Association warned defendants

that it was impossible for any of them to monopolize the market to the detriment of the others. As a result of the meetings and other efforts by cartel members, prices for vitamin C in December 2003 increased from $4.20 per kilogram at the beginning of the month to over $9 per kilogram by the end of the month.

In June 2004, following some price declines, defendants agreed to shut down production for equipment maintenance in order to boost prices back toward their December 2003 highs. Defendants also agreed to restrict exports to the United States to further stabilize prices. Plaintiffs allege that defendants' anticompetitive activities are ongoing.

Defendants move to dismiss on grounds of act of state, foreign sovereign compulsion and international comity. In addition, plaintiffs have filed a second amended complaint adding a direct purchaser plaintiff and two defendants. The two newly added defendants and, separately, the original defendants, move to dismiss the second amended complaint for failure to include any factual allegations regarding the newly added defendants or to explain how their addition affects the conspiracy alleged in the second amended complaint.

Appendix D

Discussion

(1)

Motion to dismiss under act of state, foreign sovereign compulsion and international comity doctrines

Defendants do not deny the allegations in the complaints for purposes of their motion to dismiss. Rather, they argue that their actions were compelled by the Chinese Ministry of Commerce ("Ministry").[3] They invoke the doctrines of act of state, foreign sovereign compulsion and international comity as defenses to suit. Each of these defenses rests on different doctrinal underpinnings, but they are all premised on an act by a foreign government.

The act of state doctrine derives from both separation of powers and respect for the sovereignty of other nations. It holds that the courts of one nation may not sit in judgment of the public acts of another sovereign within its own borders. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). The reasons for the doctrine were outlined by the Supreme Court over a century ago:

> Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of

3. The Ministry was formerly known as the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"). Both entities will be referred to as the Ministry herein.

> another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). Thus, any censure of another country's acts within its own territory is reserved to diplomatic channels and does not come within the purview of the courts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304, 38 S. Ct. 309, 62 L. Ed. 726 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." (internal quotation marks omitted)). The Supreme Court has built upon the foundations of the act of state doctrine to note that, in the context of adjudicating the legality of expropriations by a foreign state, "[p]iecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). Thus, the act of state doctrine is aimed at reserving for the executive branch decisions that may significantly affect international relations.[4]

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4. A plurality of the Supreme Court has recognized a commercial exception to the act of state doctrine, pursuant to which "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Alfred*

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The defense of foreign sovereign compulsion, on the other hand, focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states. Rather than being concerned with the diplomatic implications of condemning another country's official acts, the foreign sovereign compulsion doctrine recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's.

Finally, international comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and

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Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. 682, 695, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976). The Second Circuit, however, has not adopted this exception. *See Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) ("We leave for another day consideration of the possible existence in this Circuit of a commercial exception to the act of state doctrine under *Dunhill*."). Even if the exception were recognized within this Circuit, defendants and the Ministry have made a compelling argument for why the Chinese government's involvement - to the extent it exists - in defendants' price-fixing scheme amounts to a public, rather than commercial, act. Namely, they argue that the government was working to guide the vitamin C industry in China's transition from a command to a market economy. If so, and if - as defendants and the Ministry argue - defendants were acting in a governmental capacity when they fixed prices, it is not even clear that the Sherman Act would apply, as it is directed at private actors.

> convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895). The Ninth and Third Circuits have each set forth a list of factors to be weighed in determining whether to assert jurisdiction, [5] but in any event, abstention from

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5. The factors given by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) are:

> [1] the degree of conflict with foreign law or policy,
>
> [2] the nationality or allegiance of the parties and the locations or principal places of businesses or corporations,
>
> [3] the extent to which enforcement by either state can be expected to achieve compliance,
>
> [4] the relative significance of effects on the United States as compared with those elsewhere,
>
> [5] the extent to which there is explicit purpose to harm or affect American commerce,
>
> [6] the foreseeability of such effect, and
>
> [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The factors listed by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) are:

> 1. Degree of conflict with foreign law or policy;
>
> 2. Nationality of the parties;

exercising jurisdiction for reasons of international comity depends on the existence of a "true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). No conflict exists for this purpose unless Chinese law requires defendants "to act in some fashion prohibited by the law of the United States," or unless defendants "claim that their compliance with the laws of both countries is otherwise impossible." *Id.* at 799.

These defenses rest on facts that are not found within the complaints - namely, whether the Chinese

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3. Relative importance of the alleged violation of conduct here compared to that abroad;

4. Availability of a remedy abroad and the pendency of litigation there;

5. Existence of intent to harm or affect American commerce and its foreseeability;

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue.

government required defendants to fix prices in violation of the Sherman Act. Nevertheless, defendants insist that this case may be properly dismissed at the pleadings stage[6] because the Ministry has submitted an amicus brief detailing the Ministry's role in orchestrating and maintaining the vitamin C cartel. According to defendants, the Ministry's brief must be accepted as true, because it is the official position of the government of China.

a. The Ministry's amicus brief

The Chinese government's appearance as amicus curiae is unprecedented. It has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case.

The Ministry is the "highest administrative authority in China authorized to regulate foreign trade," and is "the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system." Ministry Br. at 1. The Ministry argues that the body plaintiffs have characterized as a "trade association"

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6. Defendants assert that courts "routinely consider, and often grant, dismissal of [similar] cases ... at the Rule 12 motion stage," but they cite only four cases, all of which were decided between 1971 and 1983. Of those four, one was decided after discovery was completed, *Van Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977), and three were dismissed based on the allegations in the complaint, *see Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971).

that facilitated the actions of the alleged cartel is in fact the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber"). The Chamber is "an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry." Ministry Br. at 5. In contrast to the voluntary, non-governmental chambers of commerce that exist in the United States, chambers of commerce in China have played a central role in China's shift from a command economy to a market economy. *Id.* at 7. In particular, the Ministry asserts that the Chamber stepped into the shoes of stated-owned national exporting entities when those entities stopped regulating exports of pharmaceutical products, including vitamin C. *Id.*

The Chamber had its origins in 1991, when the Ministry promulgated Measures for Administration over Foreign Trade and Economic Social Organizations. Mitnick Decl. Ex. D ("Ministry Measures"). Article 14 of the Ministry Measures dictates that "Social organizations established with coordination and industry regulation functions *as authorized by* [the Ministry] must implement the administrative rules and regulations relating to foreign trade and economy." *Id.* at 5 (emphasis added). The Ministry represents that the Chamber was one of those social organizations authorized to implement rules and regulations, thus imbuing it with governmental regulatory authority. Indeed, the Ministry asserts that the Chamber "act[s] in the name, with the authority, and under active supervision, of the Ministry," thus performing "a governmental function so authorized under Chinese law." Statement in *In re Vitamin C Antitrust Litigation*,

June 9, 2008. The Ministry Measures further provide in Article 17 that the Ministry "shall be directly responsible for the daily management of social organizations established with coordination and industry regulation functions." Ministry Measures, at 5.

In 1997, the Ministry and State Drug Administration ("SDA") issued a notice ("the notice") requiring strict control of vitamin C production, in light of "intense competitions and challenges from the international market." 1997 MOFTEC & SDA Notice, Mitnick Decl. Ex. H at 1. The notice required the Chamber to establish a Vitamin C Coordination Group (later known as the Vitamin C Sub-Committee), which was to "coordinate with respect to Vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities." *Id.* ¶ 6. The notice further explained that "[t]he specific method for coordination shall be formulated by the Chamber, and filed to [the Ministry] for record." *Id.*

In 1998, the Ministry acknowledged and approved a request (apparently from the Chamber) to establish a Vitamin C Sub-Committee within the Chamber. Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Mitnick Decl. Ex. F. The Ministry declared that "[t]he major responsibilities of VC Sub-Committee are: to be responsible for coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy development of Vitamin C export to China." *Id.* The Sub-Committee

charter ("the charter"), which predated the formal establishment of the Sub-Committee by several months, provides that the Sub-Committee "shall coordinate and administrate market, price, customer and operation order of Vitamin C export." Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Mitnick Decl. Ex. G, Art. 7.

The charter limits membership in the Sub-Committee to vitamin C exporters whose export volume in any year from 1994 to 1996 exceeded 200 tons, and specifies that "[o]nly members of the Sub-Committee have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." *Id.*, Arts. 11, 12. The charter goes on to list among members' obligations that members "shall voluntarily adjust their production outputs according to changes of supplies and demands on international market." *Id.*, Art. 15(3). The charter also requires members to "strictly execute export coordinated price set by the Chamber and keep it confidential." *Id.*, Art. 15(6).

The charter provides for sanctions for "failure to perform any member's obligation," including "warning, open criticism and even revocation of its membership." *Id.*, Art. 16. In describing the ultimate penalty for non-compliance, the charter notes that the Sub-Committee "will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the Vitamin C export right of such violating member." *Id.*

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In 2002, the Ministry changed the method of price review "in order to accommodate the new situations since China's entry into WTO." 2002 MOFTEC & Customs Notice, Mitnick Decl. Ex. J at 1. The new regulation subjected 30 categories of export products (including vitamin C) to "Price Verification and Chop" by their respective chambers, and no longer subjected them to supervision and review by customs. *Id.* ¶ 1. The procedure for Price Verification and Chop calls for exporters to send the export contracts to the relevant chambers for verification before Customs declaration. Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (No. 36,2003) ("Announcement No. 36,2003"), Exhibit 2: Procedures for Implementing the Verification and Chop System on Export Commodities ¶ A, Mitnick Decl. Ex. K. "If it is verified that the contracts comply, the Chamber shall fill in the Verification and Chop Form of China Chamber of Commerce for the relevant chamber and affix the counter-forgery V&C chop to the V&C Form and to the export contracts at the blocks where the prices and quantities are specified, and then deliver them back to the exporters." *Id.* Customs will only allow for export those shipments that are accompanied by export contracts with the required chop. Announcement No. 36,2003.

Based on this regulatory framework for the Chamber and Vitamin C Sub-Committee, defendants and the Ministry argue that defendants were compelled under Chinese law to collectively set a price for vitamin C exports. Although they are careful to note that "the

Ministry itself did not decide what specific prices should be," Ministry Br. at 13, defendants and the Ministry assert that defendants could not have exported vitamin C that did not conform to the agreed-upon price.

b. The underlying documents

Plaintiffs attack the exhibits attached to the Ministry's brief as mere notices and charter documents of a nongovernmental organization. They allege that the Ministry has not pointed to a single law or regulation compelling a price or price agreement at issue in the Complaint. They note, furthermore, that the price collusion complained of in the Complaint began in December 2001, long after the Chamber and Vitamin C Sub-Committee were established and purportedly compelled to set prices, and only after defendants had achieved the market power necessary to sustain above-market prices.

Plaintiffs point to publicly available records of the Chamber and its Vitamin C Subcommittee in support of their position that defendants' price agreements were voluntary:

> In December 2001, efforts by the Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, each *domestic manufacturers were able to reach a self-regulated agreement successfully*, whereby they would *voluntarily control* the quantity and pace of exports, to achieve the goal of stabilization while raising

> export prices. Such *self-restraint measures*, mainly based on "restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically" *have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention.*[7]

Printout from website of China Chamber of Commerce of Medicines and Health Products Importers and Exporters Information, Pls.' Mem. in Opp'n to Defs' Mot. to Dismiss ("Pls.' Opp'n"), Ex. D (emphasis added).

Plaintiffs also rely on an expert in Chinese law, Professor James V. Feinerman, who concludes based on a review of the Ministry's brief and its exhibits that defendants' conduct was not compelled by Chinese law. Pls.' Opp'n Ex. K ("Feinerman Decl."). As an initial matter, Professor Feinerman disputes the authenticity of many of the Ministry's exhibits, on the basis that they do not contain a chop, that they are not governmental laws or regulations, that they are not specific to vitamin C, or that they are mis-translated. Regarding the Ministry's 1998 approval of a request to establish the Vitamin C Sub-Committee, Professor Feinerman notes that the

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7. The Ministry argues that such documents should not be taken at face value. The Ministry argues that many of the terms appearing in defendants' and the Chamber's documents have meanings in the context of China's government and economic policy that are quite different from their literal translations. Among the controversial terms are "social organization," "voluntary self-restraint," "coordination," "industry self-discipline," and "verification."

document merely "authorizes the creation of the entity." *Id.*, ¶ 16. He points out that this "reflects the reality in China that an organization not expressly allowed would be prohibited, in contrast to the long-standing Western norm that anything not expressly prohibited is allowed." *Id.* Accepting Professor Feinerman's characterization leads to the conclusion that a cartel in China could only exist with governmental sanction. At that point it becomes difficult to differentiate between a cartel that was voluntarily formed by its members, who then had to seek governmental approval, and a cartel that was mandated by governmental fiat.

With the benefit of discovery, plaintiffs submitted a supplemental memorandum and exhibits which, they contend, demonstrate that defendants voluntarily restricted export volume and fixed prices for vitamin C. For example, the minutes from a November 16, 2001 meeting of defendants held under the auspices of the Chamber show that the defendants agreed by hand voting to restrict output and fix prices at CIF 3.00/kg effective January 1, 2001. Minutes of Meeting by Officials of Vitamin C Manufacturers, Pls.' Supp. Mem. in Opp'n to Defs.' Mot. to Dismiss ("Pls.' Supp. Mem.") Ex. 14 at 3-4.

Defendants admit that the minimum export price subject to verification and chop has been $3.35 per kilogram since May 2002. Northeast Pharma. Group Co.'s Third Amended Response to Pls.' Second Set of Interrogatories, Pls.' Supp. Mem. Ex. 2 at 18. Notwithstanding this mandated price, defendants have sold vitamin C above that price since its implementation.

Dep. of Ning Hong, Pls.' Supp. Mem. Ex. 5 at 68-70. For example, according to documents produced by defendant Jiangsu Jiangshan, in June 2003

> [O]ur company organized a meeting on market analysis among the six domestic manufacturers and the China Chamber of Commerce of Medicines & Health Products in Qing Dao. *We all agreed to set the floor price at 9.20 USD/kg*, hoping to slow down the speed of market price falling, also hoping to strengthen the confidence of middle suppliers and customers. Looking at the effect a couple of weeks later of this month, the effect of this price limitation is very limited, every manufacturer quoted prices lower than the floor price.

Import/Export Department June Work Summary ¶ 5, Pls.' Supp. Mem. Ex. 8 (emphasis added).

In addition, the person responsible for negotiating export contracts for one of defendants testified in his deposition that he was aware of some price having been mandated by the government, but he could not remember what it was. Dep. of Ning Hong, at 68.[8] This testimony suggests that the hand of government was not weighing

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8. The deponent testified as follows:

> Q. Does the Chamber review the contracts to determine whether a minimum export price has been met?
>
> A. They might, I think they should.

as heavily on defendants as defendants and the Ministry would have this court believe.

Several of the documents plaintiffs attach as exhibits to their supplemental brief appear to be notes from meetings or the musings of defendants' employees. As such, it is unclear whether they would qualify as business records or otherwise be admissible as evidence. Although their provenance is unclear, these documents do provide glimpses into what may have been defendants' thinking regarding price-fixing. For example, plaintiffs have procured a document entitled "Thought on Coordinated Production Termination," in which the author writes:

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* * *

Q. Are you the main person responsible for negotiating prices of vitamin C with U.S. customers?

A. Yes, I handled the very specific processes. I do that.

Q. Are you aware of any minimum export price today for vitamin C?

A. I think so. I feel that it might be.

Q. Do you know what it is?

A. I can't recall.

* * *

Q. No one has ever told you that the Chamber won't approve a contract with a price below $335 cents, have they?

A. I cannot recall.

Dep. of Ning Hong, at 68-70.

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> We are reluctant to admit the fact that the chamber of commerce will continue to be a major force in coordinating companies of this industry, particularly in a difficult situation. The role of the chamber of commerce as the industrial association will be intensified rather than weakened in the future. Therefore, there is no need for us to go beyond coordination of the chamber of commerce, which will do no good to our current or future work. The work of the chamber of commerce will be supported by the Ministry of Commerce. We should not regard the coordination simply as authoritarianism of the chamber of commerce.

Thought on Coordinated Production Termination, Pls.' Supp. Mem., Ex. 12.[9] The author continues:

> The act of deciding production or prices based on coordination is a kind of monopoly whatever the reasons. However, I believe we should not have any worry since the Ministry of Commerce is a friend of the court in the lawsuit. If we won the lawsuit, it would be hard for foreigners to make more trouble. Even if we lost the case, the government would take the foremost part of responsibility. After all, we need to do many things in a more hidden and smart way.

Id.

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9. Plaintiffs do not describe the source of this document. It bears Bates number JJBA11-1.

Documents such as these - if they are to be credited suggest a complex interplay between the Chamber and defendants that makes it difficult at this stage to determine the degree of defendants' independence in making pricing decisions.

c. Authority of the brief

The authority of the Ministry's brief is critical to defendants' motion, because, as noted above, the documents on which defendants rely to demonstrate governmental compulsion of their anti-competitive acts suggest on their face that defendants' acts were voluntary rather than compelled. Defendants contend that the Ministry's brief must be taken as conclusive on the issue of Chinese law - and particularly on the question of whether defendants' conduct was mandated by Chinese law, citing *United States v. Pink*, 315 U.S. 203, 218-21, 62 S. Ct. 552, 86 L. Ed. 796 (1942), and *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919). In *Pink*, the Court was determining the intended extraterritorial effect of a Russian decree, and was presented with an official declaration from the Russian official charged with interpreting existing Russian law. 315 U.S. at 220. The Court held that the declaration was "conclusive" on the issue of the Russian decree's intended extraterritorial effect. *Id.* Similarly, the Second Circuit in *American Can* had before it a certificate from the Russian ambassador to the United States, which it accepted as "binding and conclusive ... on the matters to which it relates." 258 F. at 368-69.

Plaintiffs counter that Fed. R. Civ. P. 44.1, which was first adopted in 1966, permits a court to "consider any relevant material or source, including testimony," when determining foreign law. Plaintiffs assert that Rule 44.1 allows courts wide discretion to determine foreign law, and that they are not bound to accept the assertions of foreign sovereigns.

Indeed, post-Rule 44.1 decisions from the Second Circuit have adopted a softer view toward the submissions of foreign governments. In *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70 (2d Cir. 2002), the Ministry of Finance of the Republic of Indonesia asserted that under Indonesian law, certain funds belonged to the Republic of Indonesia. The Second Circuit agreed that "a foreign sovereign's views regarding its own laws merit - although they do not command - some degree of deference." *Karaha Bodas*, 313 F.3d at 92. After independently analyzing the relevant Indonesian law, the court accepted the Republic of Indonesia's interpretation, noting: "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.*

More recently, the Second Circuit opted not to follow an affidavit from the Chilean Corporation of Judicial Assistance of the Region Metropolitana ("Central Authority") regarding a child custody matter under the Hague Convention. *Villegas Duran v. Arribada*

Beaumont, 534 F.3d 142, 148 (2d Cir. 2008). There was a question of whether the Central Authority had all the relevant information at the time it made its affidavit, but the court held that "even if [the affidavit] is authoritative, the district court was not bound to follow it." *Id.* (citing *Karaha Bodas*, 313 F.3d at 92).

The Ministry's Brief is, therefore, entitled to substantial deference, but will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position.

d. Role of the Chinese government in defendants' agreement to fix prices

All three of defendants' defenses rest on the proposition that their collusion on prices for vitamin C was due to acts of the Chinese government. Although the parties argue whether the defenses raised by defendants are jurisdictional, the issue at this stage of the case is whether there is a factual dispute as to the alleged compulsion.[10]

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10. The Ministry asserts that if the court exercises jurisdiction over this action "[i]t cannot be denied that the possibility of insult to China is significant." Ministry Br. at 22. Not every court agrees with this basis for abstention. The Ninth Circuit has noted:

> Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party .... If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way

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Many of the cases defendants rely upon in support of their motion to dismiss involved much clearer examples of government compulsion. For example, the court in *Trugman-Nash, Inc. v. New Zealand Diary Board*, 954 F. Supp. 733 (S.D.N.Y. 1997), was charged with considering the effect of the New Zealand Dairy Board Act of 1961, a formally codified New Zealand law. In that case the court interpreted the language of the statute as "mandat[ing] Board disapproval of sales price competition among New Zealand dairy producers in respect of exports to nations like the United States that restrict import quantities." *Id.* at 736. Accordingly, the court held that there was "an actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce," entitling defendants "to invoke the doctrines of act of state, foreign sovereign compulsion, and international comity." *Id.*

Similarly, the Second Circuit has applied the act of state doctrine to affirm dismissal of an antitrust case brought by a liquid bulk cargo tanker service that was shut out from importing and exporting Colombian liquid gas that challenged Colombia's cargo reservation laws. *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987). Colombia began

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> they deem appropriate - up to an including passing legislation.... If courts were to take the interests of foreign governments into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation...."

Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 803-05 (9th Cir. 2001) (Kozinski, J.).

enforcing a series of cargo reservation laws it had passed years before which required that imports and exports of certain types of cargo be transported exclusively by Colombian carriers, and the plaintiff sued the beneficiaries of these laws for violations of the Sherman Act, including conspiracy to fix prices. *Id.* at 450-51. Although the plaintiff alleged that the defendants manipulated the Colombian government into implementing the cargo reservation laws, the court held that the plaintiff's allegations "make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on." *Id.* at 452-53. The court refused to investigate the motives of the Colombian government, stating: "When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed." *Id.* at 453.

Other cases relied upon by defendants were decided on a fuller record. For example, defendants rely heavily on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), as a case supporting their argument of foreign sovereign compulsion. That case was decided on summary judgment, however, after discovery was complete. *Id.* at 1302. The case involved a boycott against an oil refiner by suppliers of Venezuelan crude oil which held concessions from the Venezuelan government. The defendants argued that their boycott was ordered by the Venezuelan government, and the court granted summary judgment based on its conclusion that the defendants had, indeed, been compelled by their government to boycott the plaintiff.

The court refused to consider whether the order to boycott was "legal or 'compulsive' under the laws of Venezuela," holding that "[o]nce governmental action is shown, further examination is neither necessary nor proper." *Id.* at 1301. Nevertheless, the court explicitly noted in that case that "[n]othing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry." *Id.* at 1297. In this case, on the other hand, the parties vigorously dispute whether defendants instigated formation of the Vitamin C Sub-Committee and whether defendants' actions in fixing prices were voluntary.

Thus, although both *Trugman-Nash* and *O.N.E. Shipping* involved dismissals of antitrust suits due to the involvement of foreign governments in anticompetitive activities, they differ from the present case in that there was no dispute in those cases as to the effect of the respective governmental acts. Here, on the other hand, the parties hotly contest both the origin and even existence of government compulsion. The Ministry has been forthright in its admission that Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments.[11] Rather than codifying its statutes, the Chinese government apparently frequently

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11. At oral argument, counsel for the Ministry explained:

> [T]he laws of the government of China do not have . . . quite the same transparency as the laws of the United States, in the sense that there are statute books that are available, that there are lengthy Congressional statements of intent, where you can read what the debates were all about.

governs by regulations promulgated by various ministries. In addition, according to the Ministry, private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents. June 9, 2008 Statement in *In Re Vitamin C Antitrust Litigation* at 2.

It is this last circumstance that so complicates the question of compulsion in this case. It is not clear from the record at this stage of the case whether defendants were performing government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens. Indeed, even the formation of the Vitamin C Sub-Committee is shrouded in mystery, as it was apparently authorized in response to a request by unidentified applicants who were, quite likely, defendants here.

If defendants wished to form a cartel, they would have had to ask for government sanction, at least according to plaintiffs' expert, who opined that in China "an organization not expressly allowed would be prohibited." Feinerman Decl. ¶ 16. It is not clear that this scenario of defendants making their own choices and then asking

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> The way the Chinese system operates is that you have the state council and the state council is then composed of a number of key ministries. The Ministry of Commerce is not some backwater regulator in a small city in China. The Ministry of Commerce is the preeminent regulator of the economy, export economy of the People's Republic.

Tr. of Mot., June 5, 2007, at 46-47.

for the government's imprimatur - which may or may not have occurred in this case - would qualify as the type of governmental act or compulsion contemplated by the defenses raised by defendants.

In support of their motion, defendants and the Ministry stress the importance to China of being able to manage the transition from a command to a market economy. The court does not question that goal or even China's methods of doing so. But the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions.[12] Accordingly, defendants' motion to dismiss is denied.

(2)

Motions to dismiss second amended complaint

Plaintiffs filed a second amended complaint ("SAC") adding Magno-Humphries Laboratories, Inc. ("MHL") as a direct purchaser class representative and adding JSPC America, Inc. ("JSPC") and Legend Ingredients Group, Inc. ("Legend") as defendants. The SAC explains that MHL directly purchased vitamin C and vitamin C products from JSPC and Legend. SAC ¶ 9. JSPC and Legend are described as California corporations that

12. One area that appears to be ripe for discovery is the degree to which defendants coordinated pricing before and after December 2001. If the apparatus and mandate for price-fixing was in place as of 1991 (when the Chamber was formed) or 1997 (when the Vitamin C Sub-Committee was formed), but no price-fixing occurred until market power was achieved, plaintiffs would have a stronger argument that defendants' actions were voluntary.

were (in the case of JSPC) or are (in the case of Legend) subsidiaries or affiliates of Jiangsu Jiangshan during the class period. *Id.* ¶ 12, 13. Other than these identifications of MHL, JSPC and Legend, the SAC copies verbatim the allegations of the first amended complaint, which are summarized above.

JSPC and Legend move to dismiss the SAC as to themselves because the SAC does not make any allegations against them personally. The original defendants move to dismiss the SAC in its entirety because, they contend, the addition of JSPC and Legend fundamentally changes the conspiracy that had been alleged in the earlier complaints. Specifically, the earlier complaints alleged a horizontal conspiracy among Chinese vitamin C manufacturers. According to defendants, however, JSPC and Legend are, or were, California corporations that never manufactured vitamin C. Thus, their addition changes the conspiracy charged from a horizontal conspiracy to a hybrid horizontal/vertical conspiracy, the details of which are not disclosed in the SAC. All defendants argue that the SAC falls short of the pleading standards set forth by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007), and by the Second Circuit in *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007).

Plaintiffs respond that the SAC is remarkably detailed in its description of the conspiracy, and that it goes above and beyond the requirements of *Twombly* and *In re Elevator Antitrust Litig.*. Plaintiffs further argue that those cases do not establish heightened pleading standards

for antitrust cases. That may be true, but even Fed. R. Civ. P. 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The SAC is indeed quite detailed in its pleading of a conspiracy among Chinese vitamin C manufacturers, but it does not explain how two California resellers could have been part of the manufacturer cartel. Thus, the SAC both fails to provide notice to JSPC and Legend as to what they are alleged to have done wrong and changes the nature of the originally-charged conspiracy.

Accordingly, the SAC is dismissed with leave to replead within 30 days to allege what actions JSPC and Legend have taken that have harmed plaintiffs.

Conclusion

For the foregoing reasons, defendants' motion to dismiss the complaints under the act of state doctrine, foreign sovereign compulsion and international comity is denied. Defendants' motions to dismiss the SAC are granted. Plaintiffs have 30 days to replead the SAC to make allegations against JSPC and Legend.

Dated: Brooklyn, New York
November 6, 2008

SO ORDERED:

/s/
David G. Trager
United States District Judge

APPENDIX E — BRIEF OF *AMICUS CURIAE* THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, DATED JUNE 29, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MASTER FILE 06-MD-1738
(DGT)(JO)

IN RE

VITAMIN C ANTITRUST LITIGATION

This Document Relates To:

ALL CASES

BRIEF OF *AMICUS CURIAE* THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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[TABLES INTENTIONALLY OMITTED]

Appendix E

INTEREST OF THE *AMICI*

In this lawsuit, plaintiffs seek to recover treble damages from four Chinese manufacturers of vitamin C, and the affiliates of one of these manufacturers, based on conduct that was compelled by Chinese law. Because the conduct that allegedly violated U.S. antitrust law occurred entirely in the territory of China, and because the defendants were required by the laws of China to engage in that conduct, this lawsuit cannot be resolved without interfering with Chinese industrial policy respecting the operation of domestic firms within China and without impermissible inquiry into the motives of the Chinese government. Accordingly, three closely related doctrines, the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity, mandate dismissal of this action.

Amicus the Ministry of Commerce of the People's Republic of China (hereinafter "the Ministry")[1] is deeply interested in the prompt and proper resolution of this lawsuit. The Ministry is a component of the State Council (the central Chinese government) and is the highest administrative authority in China authorized to regulate foreign trade, including export commerce. It is the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system. The Ministry formulates strategies, guidelines

1. The Ministry was initially known as the Ministry of Foreign Trade and Economic Cooperation. This brief uses the term "Ministry" to refer to both this predecessor entity and the current Ministry of Commerce.

and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system.

If this Court were to find the defendants' conduct violated U.S. antitrust laws, it would improperly penalize defendants for the sovereign acts of their government and would adversely affect implementation of China's trade policy. The Ministry therefore files this brief to inform the Court of the regulatory scheme that governed defendants during the period encompassed by the Complaint[2] and that dictated the conduct alleged to violate U.S. antitrust laws. The Ministry accordingly supports the defendants' request that this action be dismissed.

The information the Ministry is providing is properly considered in connection with a motion to dismiss under Rule 12(b) because each of the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity implicate this Court's subject matter jurisdiction. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 n.6 (2d Cir. 2001) (a district court "must" consider materials outside complaint if they "may result in the dismissal of the complaint for want of jurisdiction"). Indeed, both the United States Supreme Court and the Second Circuit have recognized that the statements of a foreign government about the scope and

2. The "Relevant Period" referenced in the Complaint is December, 2001 through the present.

meaning of its laws are to be given binding and conclusive effect by U.S. courts. *See U.S. v. Pink*, 315 U.S. 203, 218-21 (1942) (statement of Soviet Commissariat for Justice concerning extraterritorial effect of nationalization decree deemed "conclusive"); Agency of *Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919) (authoritative representation by Russian government is "binding and conclusive in the courts of the United States"). Since 1978, the U.S. government has encouraged foreign governments to present their views concerning pending judicial proceedings directly to the U.S. courts,[3] and the U.S. Solicitor General has taken the position that a foreign government's submission of its views in the form of an amicus curiae brief should be "dispositive."[4]

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3. *See* Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *reprinted in* U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979); Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* U.S. Dep't of State, 1978 Digest of United States Practice in International Law 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979); *see also* Letter from Deputy Legal Adviser Marks (June 15, 1979) (described in 73 Am. J. Int'l L. 669, 678-79 (1979)). A copy of the foregoing is submitted herewith as Exhibit A to the declaration of Joel M. Mitnick, dated June 29, 2006 ("Mitnick Decl.").

4. *See* Brief for United States as Amicus Curiae Supporting Appellants, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1985) (No. 83-2004) at 17 (explicit and detailed statement by foreign government should be "given dispositive weight"), Mitnick Decl., Ex. B.

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It is particularly appropriate to accord the views of the Ministry dispositive weight here because the Complaint employs terms that have very different meanings under Chinese law, and within the Chinese regulatory system, than those same terms have in the United States. Plaintiffs allege that a Chinese "trade association" facilitated an illegal cartel, which "coordinated" vitamin C export pricing as part of a series of "voluntary" or "self-restraint" agreements. In fact, the "association," or "social organization," is a Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels, and the price "coordination," or so-called "voluntary self-restraint," it facilitated is a government-mandated price and output control regime. Because China's ongoing transition from a state-run command economy to a market-driven economy is utterly foreign to the economic history and traditions of the United States, there is a very significant risk of misunderstanding by U.S. lawyers and judges of the regulatory concepts China has adopted to manage this transition. Accordingly, the Ministry files this amicus brief to explain those very different concepts as well as to emphasize that the conduct alleged in the complaints here is mandated by Chinese law. Properly understood, China's regulation of vitamin C exports mandates dismissal of this lawsuit.

BACKGROUND

I. Allegations of the Complaint

In January 2005, Plaintiffs Animal Science Products Inc. and the Ranis Company ("plaintiffs") filed the first

Complaint in this action (the "Complaint")[5] in which they allege that defendants, four Chinese manufacturers and exporters of raw vitamin C products, and affiliates of one of these manufacturers,[6] violated Section I of the Sherman Act by agreeing on the price and volume of vitamin C products exported from China to the United States.

Specifically, plaintiffs allege that the defendants formed "a cartel to control prices and the volume of exports for vitamin C .... [and] successfully reached an autonomy agreement" in which they allegedly agreed "to control export quantities and achieve stable and enhanced price goals," "to restrict their exports of vitamin C in order to create a shortage of supply in the international market," and "to 'restrict quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically.'" Compl. ¶ 43. Plaintiffs allege that, as a result of the cartel, the prices of vitamin C products exported from China to the United States increased from $2.50 per kilogram in December, 2001, to as high as $7 per kilogram in December, 2002, and that they, as purchasers of vitamin C products, were forced to pay higher prices as a result. Compl. ¶ 45.

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5. Subsequent complaints have not been consolidated into a single complaint, but all of the complaints make substantially identical allegations.

6. The Chinese defendants are: Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Northeast Pharmaceutical Group Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and China Pharmaceutical Group, Ltd. In addition, the Ministry is informed that a defunct U.S. affiliate of one of these defendants was also named in the Complaint.

Plaintiffs further allege that in 2003, defendants met and agreed to limit production levels further and increase prices (Compl. ¶ 52), and that in 2004, defendants agreed to suspend production in an effort to stabilize prices (Compl. ¶ 56).

Plaintiffs claim that the meetings held by defendants, and the agreements to which defendants were party, were "facilitated by the efforts of their trade association," the Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China.[7] Compl. ¶ 43. This "association," it is alleged, also "coordinated" the meetings at which defendants agreed to the limitations of sales and exports to the United States (Compl. ¶ 46), called a late 2003 "emergency meeting" attended by the defendants in which the "association" discussed how the defendants were to "rationalize the market and restrain and limit the production levels of vitamin C to increase prices" (Compl. ¶ 53), and met with the defendants at the "China Exhibition of World Pharmaceutical Ingredients," during which they "devised plans to rationalize the market and to limit production levels and increase prices" (Compl. ¶ 54).

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7. The official Chinese name of this entity translates as the "Chamber of Commerce of Medicines and Health Products Importers and Exporters." As described *infra*, this entity, among other things, regulates China's import and export of pharmaceuticals (or "Western medicines") and health care products, including vitamin C.

II. The Regulation of the Vitamin C Export Industry in China

A. The Nature and Regulatory Role of the Chamber of Commerce of Medicines and Health Products Importers & Exporters

As an initial matter, the allegations of the Complaint rest on a fundamental misunderstanding concerning the nature of the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber") and its role in the vitamin C industry in China. The Complaint characterizes the Chamber as a mere "trade association" that has facilitated the collusive actions of a "cartel." Compl. ¶ 43. In fact, the Chamber is vastly different from a U.S. trade association, or private Chamber of Commerce. Rather, it is an entity under the Ministry's direct and active supervision that plays a central role in regulating China's vitamin C industry. What the Complaint describes as a "cartel,"[8] and an "ongoing combination and conspiracy to suppress competition" through price-fixing (Compl.

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8. In their Complaint, and before Magistrate Judge Orenstein, plaintiffs sound a simplistic but very misleading theme: defendants here have "stepped into the shoes" of a defunct cartel of European and Japanese vitamin manufacturers, many of whom pleaded guilty to criminal price fixing charges. Hr'g Tr. 48:2-3, May 3, 2006. This theme is a blatant attempt to "poison the well" before the Court has an opportunity to understand the fundamentally different conditions under which the Chinese vitamin C export industry operated from its European and Japanese counterparts. Other than that both industries involved vitamin C, the circumstances of how those industries priced their export products could not have been more different.

¶¶ 43-44), is a regulatory pricing regime mandated by the government of China— a regime instituted to ensure orderly markets during China's transition to a market-driven economy and to promote, in this transitional period, the profitability of the industry through coordination of pricing and control of export volumes. Most importantly, this regime was established to safeguard the national interests of China.[9]

The United States has never had a state-run command economy with state-owned industries. In the years following the Civil War, chambers of commerce and other trade associations sprang up voluntarily throughout the country as a means of gathering and providing information to members of particular industries. *See Maple Flooring Mfrs. Ass'n v. U.S.*, 268 U.S. 563 (1925). The proliferation of numerous voluntary commercial and trade organizations led President Taft to note the need for a central organization in touch with such groups throughout the United States. President William Howard Taft, Third Annual Message to Congress (Dec. 5, 1911).

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9. As China carried out its economic reform beginning in 1978, namely through decentralizing Government control over, and direct management of, economic activities by permitting state-owned entities to have decision-making power and by encouraging wide private ownership in the economic sector, China was concerned about the possible effects (as it saw them) of unfettered competition between and among enterprises, including that it could retard the orderly development of a stable domestic vitamin C industry and adversely effect levels of employment in that industry. The Government attempted to temper the effects of economic reform in its regulation of domestic and foreign commerce.

This, in turn, led to the creation the following year of the U.S. Chamber of Commerce, an entirely voluntary, non-governmental organization created to, among other things, represent business interests before the federal government.

The origins and purposes of that institution stand in stark contrast to those of the similarly-named, but functionally very different, Chamber here. Prior to the advent of any free market system in China, the government itself participated in and controlled the manufacturing and exporting of goods. Only a number of state-owned national exporting entities were allowed to engage in exporting, and no private enterprises or manufacturing enterprises were allowed to export directly. These designated state-owned national exporting enterprises functioned to regulate exports under the Ministry's direction. Subsequently, however, when other types of enterprises (both private and state-owned) were allowed to obtain export licenses, the function of regulating export had to be stripped away from these state-owned national exporting entities so that they were not in the position of regulating the exports of their competitors. The Chamber was established, in part, to serve that role with respect to imports and exports of pharmaceutical products, including vitamin C; it regulates the export of those products under the authority and direction of the Ministry and the General Administration of Customs ("Customs").[10]

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10. The Chamber described its role in Chinese foreign commerce during the Relevant Period as:

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To meet the need of building the *socialist market economy* and *deepening the reform of foreign economic and trade management system*, the China Chamber of Commerce of Medicines & Health Products Importers & Exporters was established in May 1989 in an effort to boost the sound development of foreign trade in medicinal products. As a social body formed along business lines and enjoying the status of legal person, the Chamber is composed of economic entities registered in the People's Republic of China dealing in medicinal items as authorized by the departments under the [S]tate Council responsible for foreign economic relations and trade as well as organizations empowered by them. *It is designated to coordinate import and export business in Chinese and Western medicines* and provide service for its member enterprises. Its over 1100 members are scattered all over China. The Chamber abides by the state laws and administrative statutes, *implements its policies and regulations governing foreign trade, accepts the guidance and supervision of the responsible departments under the States Council. The very purpose is to coordinate and supervise the import and export operations in this business, to maintain business order and protect fair competition, to safeguard the legitimate rights and interests of the state, the trade and the members and to promote the sound development of foreign trade in medicinal items.*

China Chamber of Commerce of Medicines & Health Products Importers & Exporters, Publication of Administration and Regulation (2003), at 3 (emphasis added), Mitnick Decl., Ex. C.

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Although the Chamber is denominated a "social organization," this term also has a very different meaning under Chinese law than it has in the United States. The Chinese notion of a "social organization" includes within its scope the various "chambers" that exist under Chinese law for the purpose, when authorized, of regulating specific industries (*e.g.*, the Chamber regulates certain pharmaceutical industries, including the vitamin C industry).[11] *See* the Ministry's implementing regulation for the administration of "social organizations" (including "chambers") in foreign trade, Measures for Administration

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This document, along with all Ministry rules or regulations cited herein and attached to the Mitnick Declaration, have been authenticated under the procedures of Federal Rule of Evidence 902(3), which governs self-authentication of foreign public documents. First, an authorized official of the Ministry or the Chamber, as applicable, attested in the presence of a P.R.C. notary public to the authenticity of each document. (In the case of the Chamber, the attestation was also in the presence of a Ministry official who further authenticated the Chamber attestation.) Next, the attestation was further certified by the Consular Department of the P.R.C. Ministry of Foreign Affairs and the U.S. Embassy in Beijing. *See* Mitnick Decl., document index, for a summary of the attestation(s) and certification(s) applicable to each such document. Translations of all Chinese language documents attached to the Mitnick Declaration are certified by a qualified translation agency and further notarized by a P.R.C. notary public.

11. "Chambers [defined as 'chambers of commerce of importers and exports'] are social organizations." Notice of [Ministry] Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Sept. 23, 1994) ("Notice Regarding Chamber Personnel Management") at 1, Mitnick Decl., Ex. E.

over Foreign Trade and Economic Social Organizations (February 26, 1991) Arts. 2 and 14 ("Measures for Administration"), Mitnick Decl., Ex. D (emphasis added) ("Social organizations established with *coordination and industry regulation functions as authorized by [the Ministry]* must implement the administrative rules and regulations relating to foreign trade and economy."). As discussed, *infra*, regulation over export pricing and output levels was a specific vitamin C "industry regulation function" delegated by the Ministry to the Chamber.

The Ministry's authority over the Chamber is plenary: covering such aspects as the Chamber's selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure. *Id.* Art. 16. *See also*, Notice Regarding Chamber Personnel Management, Annex II, 4 (Ministry shall verify and approve Chamber's authorized number of personnel); Annex III, 8 (Chamber's general working staff "shall be chosen primarily from the employees in service of their membership organizations or the competent authorities in charge of foreign trade and economics and the public institutions directly under their leadership"); Annex IV, 13 (candidates for senior positions within the Chamber "are recommended by [the Ministry] or recommended by over 1/3 of the [C]hamber's member companies and approved by [the Ministry]"); and Annex V, 17 (Ministry shall "verify and approve the total amount of salary of the [C]hamber"). The Chamber, in turn, must submit to the Ministry its "annual working plan and arrangements of major events," including all "important meetings and activities." Measures for Administration, Art. 21. Similarly, the Chamber "must implement the

administrative rules and regulations relating to foreign trade and economy." *Id.* Art. 14. In short, the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China.

B. The Vitamin C Sub-Committee

Throughout the Relevant Period, the Chamber exercised its regulatory authority with respect to vitamin C exports through its Vitamin C Sub-Committee. The Sub-Committee was established in 1997, at the Ministry's order, against a backdrop of "intense competition and challenges from the international [vitamin C) market." Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters (issued March 23, 1998), Mitnick Decl., Ex. F. The Sub-Committee, operated under the Chamber's direction and administration, is responsible for "coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy development of Vitamin C export of China." *Id.* ¶ 2.

Only companies that exported vitamin C in certain specified volumes were eligible to be members of the Sub-Committee. Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters (October 11, 1997) Art. 11 ("Vitamin C Sub-Committee Charter"), Mitnick Decl., Ex. G. Pursuant to the Vitamin C Sub-Committee

Charter, only Sub-Committee members "have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." *Id.* Art. 12. With this right come a series of "obligations," including the duty to "comply with the ... regulations of the Vitamin C Sub-Committee and implement [its] resolution," and to export and supply vitamin C "only to those foreign trade enterprises verified by the Sub-Committee." *Id.* Art. 15(1)&(2). Most significantly for purposes of this case, members are obligated to *"[s]trictly execute export coordinated price set by the Chamber and keep it confidential."* *Id.* Art. 15(6) (emphasis added). The Charter further provides that any "failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee." *Id.* Art. 16. Authorized punishments include "warning, open criticism and even revocation of ... membership," and imposition of monetary penalties. *Id.* In addition, the Sub-Committee may recommend, through the Chamber, that the Ministry "suspend and even cancel the Vitamin C export right of such violating member," *id.*, resulting in a total ban on participation in exporting altogether.

1. Initial Regulations Mandating Coordination (So-Called "Voluntary Self-Restraint") in Establishing Export Price and Quantity

Shortly after it mandated the establishment of the Vitamin C Sub-Committee, the Ministry, acting in conjunction with the State Drug Administration, promulgated a new regulation authorizing and requiring

the Chamber and Sub-Committee to limit the production of vitamin C for export and to set export prices. Notice Relating to Strengthening the Administration of Vitamin C Production and Export ("1997 Ministry & SDA Notice"), Mitnick Decl., Ex. H. The regulation limited participation in the vitamin C export industry to those companies qualified to be members of the Sub-Committee, then required all such eligible entities to "participate in such [Sub-Committee] and subject themselves to the coordination of the [Sub-Committee]." *Id.* at 2. The Sub-Committee, in turn, was required to *"formulate and adjust [the] export coordination price, which the Vitamin C export enterprises must strictly implement."* *Id.* (emphasis added).

Under this regulation, qualified vitamin C manufacturers and import and export companies were able to receive a Vitamin C export quota license. The issuance of Vitamin C export licenses was subject to two criteria. First, the export volume was required to be in compliance with the export quota. Second, the export price was required to be no lower than the price established by the Vitamin C Subcommittee's coordinated price agreements. *See id.* ("The organizations that [are] authorized by [the Ministry] to issue export licenses [were to] strictly verify the qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas."). In addition, the volume to be exported by each qualified entity under this "Production and Export Licensing System" was determined by the Ministry, in conjunction

with the State Drug Administration and "relevant departments." *Id.* at 1-2. Attempts to circumvent the verification process were subject to penalties, including a reduction in an entity's export quota or the revocation of its exporting license. *Id.* para. 7 ("Vitamin C Export Coordination Group shall timely organize meetings for the major Vitamin C export enterprises ... to ... formulate and adjust export coordination price, which the Vitamin C export enterprises must strictly implement in accordance with. With respect to enterprises competing at low price and reducing price through any disguised means, a penalty shall be imposed ....") and para. 10 (" ... penalties [for violating provisions of Paragraph 7] shall be ... the Vitamin C export quota may be reduced, in the worst case their Vitamin C export right shall be revoked").

As the foregoing makes clear, price "coordination" within this regulatory system does not mean that prices are established independently or, even, by "voluntary" agreement among manufacturers, as that term is normally understood in the West. Rather, the decisions to limit the volume of exports and to set export prices were made by the Ministry. The Ministry chose to implement these policies by limiting vitamin C exporting rights to certain qualified entities, compelling those entities to participate in a subcommittee of a Ministry-approved and supervised regulatory body, and requiring that subcommittee to set export prices that exporters were then required to implement, subject to a verification system that included severe penalties for non-compliance. Within this system, therefore, "coordination" refers to the government mandated multilateral process in which

prices were set—as opposed to a unilateral process in which the Ministry alone set prices. (Indeed, the Sub-Committee was originally designated the "Vitamin C *Coordination* Group," and was referred to by that name in the 1997 Ministry & SDA Notice. see id. at 2.) The industry participants in this multilateral process, thus, acted pursuant to governmental compulsion; when establishing price controls, they were exercising governmental regulatory power; and the price controls developed through this multilateral process were legally binding and governmentally-enforced.[12]

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12. Plaintiffs rely heavily on a document from the Chamber's website that states:

> In December 2001, through efforts by the Vitamin C Chapter of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, the manufacturers were able to successfully reach a *self-restraint agreement*, whereby they would *voluntarily* control the quantity and pace of exports, so as to achieve the goal of stabilizing and raising export prices.

Letter from William Isaacson and Alana Rutherford to Honorable James Orenstein (May 12, 2006) at 3 and Exhibit C (emphasis added); *see also* Hr'g Tr. 47-48, May 3, 2006; Pretrial Order (JO), May 4, 2006, 2-3. In the context of the Ministry's regulation of the vitamin C industry through the Chamber, however, the characterizations by the Chamber of the conduct as "self-restraint" and "voluntary" are unremarkable. The vitamin C industry was under a direct Ministry order to reach a "coordinated" agreement in order to stabilize export pricing. Thus, it is understandable that the Chamber would express its pleasure publicly that the parties were able to comply with the Ministry's order to coordinate pricing and quantities on their own (*i.e.*, "voluntarily" and in "self-restraint") as opposed to requiring more direct Ministerial

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This system of Ministry-mandated and Chamber-administered "coordination" was adopted to forestall potential market disorders that might have limited the development of a healthy vitamin C export industry during China's transition from a command economy to a market-driven economy. *See* Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-Than-Normal Price (March 20, 1996), Mitnick Decl., Ex. I (explaining that the Ministry promulgated interim regulations to "ensure orderly development of the country's export trade, safeguard the legitimate rights and interests of the State and enterprises and prevent conduct of exporting at lower-than-normal price"). A system of government-mandated "coordination" among industry participants served the Ministry's goal of transitioning to a healthy market-based economy: it established mandatory coordinated export price and output levels (thereby forestalling what the government feared could be destructive export competition before the foundation for a healthy industry could be laid) by vitamin C manufacturers, although the Ministry itself did not decide what specific prices should be. Instead, this governmental function was delegated to market participants and the Chamber, in their capacities as Vitamin C Sub-Committee members, acting in a coordinated fashion.

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intervention to reach that result. Indeed, as discussed in Point II.B.2., *infra*, this regulatory system was expressly enacted "to promote [among other things] industry self-discipline."

2. Revised Regulation of Export Pricing and Quantity: Verification and Chop

In 2002, the Ministry changed the way in which compliance with the Chamber's "coordination" was confirmed by abolishing the Export Licensing System and establishing a so-called "verification and chop" system. *See* Notice Issued by the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs ("2002 Ministry & Customs Notice"), Mitnick Decl., Ex. J. The Ministry adopted this new system "in order to accommodate the new situations since China's entry into WTO, maintain the *order* of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, *promote industry self-discipline* and facilitate the healthy development of exports." *Id.* at 1, Preamble (emphasis added). The Ministry explained that this new system would be both "convenient for exporters while it is conducive for the Chambers to coordinate export price and industry self-discipline." *Id.* at 2, para. 4. The basis of the new system was a process of *"industry-wide negotiated prices." Id.* at 2, para. 3 (emphasis added).

Under this system, the Chamber reported the "coordinated," or "industry-wide negotiated," prices for vitamin C exports to Customs. *Id.* Manufacturers were required to submit documentation to the Chamber which indicated both the amount and price of vitamin C to be exported. The Chamber "verified," *i.e.*, approved,

the contract price and volume. If the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a special seal, known as a "chop," on the contract and returned it to the manufacturer. Upon export, the contract was reviewed by Customs and allowed to go through only if the contract bore the Chamber's "chop." *Id.* The penalty for violating the system was draconian: withholding of the Chamber's "chop" meant complete denial by Customs of the ability to export.

In 2003, the "verification and chop" system was continued with respect to several commodities industries, including the vitamin C industry. Vitamin C exporters were required to submit contracts to the Chamber, which "verified" the exporters' submissions *"based on the industry agreements* and in accordance with the relevant regulations promulgated by the Ministry of Commerce ... and the General Administration of Customs." Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (November 29, 2003) (Exhibit 2, para. C) (emphasis added), Mitnick Decl., Ex. K. "Enterprises exporting by forging the [Verification & Chop] on the contracts will be punished by the Customs and Chambers of Commerce according to relevant rules." *Id.* at 1. Through its 2003 announcement, in conjunction with the General Administration of Customs, the Ministry extended this system throughout the Relevant Period.

Appendix E

ARGUMENT

I. Dismissal Is Mandated By The Foreign Sovereign Compulsion Doctrine

"Under the foreign sovereign compulsion doctrine the courts will immunize private defendants from antitrust liability for conduct that is actually compelled, not merely permitted by a foreign sovereign acting within its jurisdiction. In that case, the acts of the private party 'become effectively acts of the sovereign.'" P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 274c at 406-07 (2d ed. 2000), *quoting Interamerican Refining Corp. v. Texaco Maracaibo. Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1980) (other citations omitted).[13]

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13. In their Antitrust Enforcement Guidelines for International Operations, the U.S. Department of Justice and the Federal Trade Commission provide the following illustration of conduct that they acknowledge cannot be challenged under U.S. antitrust law:

> Assume for the purpose of this example that the overseas production cutbacks have the necessary effects on U.S. commerce to support jurisdiction. As for the participants from the two countries that did not impose any penalty for a failure to reduce production, the Agencies would not find that sovereign compulsion precluded prosecution of this agreement. As for participants from the country that did compel production cut-backs through the imposition of severe penalties, the Agencies would acknowledge a defense of sovereign compulsion.
>
> Greatly increased quantities of commodity X have flooded into the world market over the last two

Appendix E

U.S. courts, including the Second Circuit, have recognized that they lack subject matter jurisdiction over antitrust actions that challenge private conduct that is compelled by a foreign government. *Certified O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987) *cert. denied* 488 U.S. 923, (1988); *Mannington Mills, Inc. v. Congoleum Com.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A*, 549 F.2d 597, 606-07 (9th Cir. 1976); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prod. Holdings (North America), Inc.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1080 (S.D.N.Y. 1988); *cf. Interamerican*, 307 F. Supp. at 1296-98 (granting summary judgment on the merits based on the defense).

> or three years, including substantial amounts indirectly coming into the United States. Because they are unsure whether they would prevail in an antidumping and countervailing duty case, U.S. industry participants have refrained from filing trade law petitions. The officials of three foreign countries meet with their respective domestic firms and urge them to "rationalize" production by cooperatively cutting back. Going one step further, one of the interested governments orders cutbacks from its firms, subject to substantial penalties for non-compliance. Producers from the other two countries agree among themselves to institute comparable cutbacks, but their governments do not require them to do so.

Antitrust Enforcement Guidelines for International Operations, issued by the U.S. Department of Justice and the Federal Trade Commission (April, 2005), Illustrative Example K, Section 3.32.

Appendix E

The foreign sovereign compulsion doctrine is "[a] corollary to the act of state doctrine"; it recognizes "that corporate conduct which is compelled by a foreign sovereign is ... protected from antitrust liability, as if it were an act of the state itself." *Timberlane*, 549 F.2d at 606. "When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims under the antitrust laws are dismissed" for lack of subject matter jurisdiction. *O.N.E. Shipping*, 830 F.2d at 453 (affirming jurisdictional dismissal based on the defense); see also *McElderry*, 678 F. Supp. at 1 080 (same). The doctrine is applicable where "the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills*, 595 F.2d at 1293.

The foreign sovereign compulsion doctrine is fully applicable — and dispositive — here. Chinese law, promulgated by the Ministry and administered through the Chamber, compelled defendants, as members of the Vitamin C Sub-Committee, to coordinate export prices and maximum export volumes and to abide by those requirements. Under the Ministry's regulations, defendants were compelled to become participating members of the Vitamin C Sub-Committee, 1997 Ministry & SDA Notice at 2 Ex. H, and Vitamin C Sub-Committee Charter, Art. 12, Ex. G, they were compelled to *"formulate and adjust [the] export coordination price,"* 1997 Ministry & SDA Notice at 2 (emphasis added), Ex. H, and they were compelled to abide by and implement that "coordinated" price, *id.*, and Vitamin C Sub-

Committee Charter, Art. 15(6), Ex. G. Defendants would not have been eligible to export vitamin C at all if they failed to participate in these price-setting and production-limiting activities. 1997 Ministry & SDA Notice, Ex. H; Vitamin C Sub-Committee Charter, Art. 12, Ex. G. Government entities policed defendants' compliance with the resulting prices and volume limits, and non-compliance would subject defendants to severe penalties, including, among other things, reduction in export quotas (resulting in further economic loss), and, possibly, loss of export rights. 1997 Ministry & SDA Notice at 2, Ex. H; Vitamin C Sub-Committee Charter, Art. 16, Ex. G; 2002 Ministry & Customs Notice at 2, Ex. J.

As noted above, while China is in the process of moving actively from its former state-run command economy to a market economy more of a type familiar to the United States, the current economic system is transitional and there remains a level of active state direction and coordination that has no analogue in the United States. Thus, for example, one would not find in the United States a government mandate to "maintain order in market competition," to "promote industry self-discipline," or to mandate export pricing and output levels "based on the *industry agreements*"; nor would one find a governmentally-directed organization, such as the Chamber, directing parties to attend meetings, such as those referred to in the complaints, to discuss prices or export quotas, with a view to maximizing industry profitability in export commerce.

That, however, is precisely the transitional framework under which the vitamin C industry functioned throughout

the Relevant Period. Thus, while the Government did not, itself, determine specific prices or quantities, it most emphatically did insist on those matters being determined *through industry coordination.* That, of course, is all that is alleged in the complaints here and that is conduct that was compelled by the Chinese government in the interests of insuring "order in market competition."

It is thus clear that these mandates of Chinese law were "basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills,* 595 F.2d at 1293. The central allegations of the Complaint are that defendants "agreed to control export quantities and achieve stable and enhanced price goals," and that plaintiffs were injured because the price of vitamin C products "has been fixed, raised, maintained and stabilized at artificial and non-competitive levels." Compl. ¶¶ 43 and 62. The decision to control export quantities and require coordinated export prices was made by the Ministry. Defendants were compelled to implement these decisions through participation in the Vitamin C Sub-Committee. Similarly, the Complaint alleges that the allegedly unlawful prices and production limits were established through defendants' "participat[ion] in meetings and conversations in China and elsewhere in which the prices, volume of sales and exports to the United States, and markets for vitamins were discussed and agreed upon." Compl. ¶ 46. Again, contrary to the allegations of the complaint, defendants were compelled by the Ministry to engage in these very activities. The government-supervised Chamber facilitated and

coordinated those meetings, and was required to advise the Ministry of such meetings.

Accordingly, the price "coordination" alleged in the complaint cannot serve as a basis for the imposition of antitrust liability. Indeed, just as in *O.N.E. Shipping*, this "antitrust suit represents a direct challenge to [the Ministry's medicinal product export] laws and to the legality of [defendants'] agreements under those laws." 830 F.2d at 451. Those "laws were designed to promote the development of a strong [Chinese medicinal products industry] and to assist [China's] economic development." *Id.* Accordingly, here, as in *O.N.E. Shipping*, "the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the [Ministry]." *Id.* at 453. *See also Trugman-Nash, Inc.*, 954 F. Supp. at 736 (New Zealand dairy producers entitled to defense of foreign sovereign compulsion where New Zealand law required export licensing board to disapprove "of sales price competition among New Zealand dairy producers in respect of exports to nations like the United States that restrict import quantities")[14]

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14. The arguments of the United States in its amicus brief in *Matsushita* (*see* footnote 4, *supra*) apply here with equal force:

> [T]he court of appeals should have given dispositive weight to the statement submitted to the district court by the Japanese Government, which indicated explicitly that part of petitioners' conduct was compelled. The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that

Finally, this case stands in stark contrast to those where courts have deemed the foreign sovereign compulsion doctrine inapplicable. For example, in *Continental Ore Co. v. Union Carbide and Carbon Com.*, 370 U.S. 690 (1962), the Court held that the defense was not available to a Canadian entity that was given the exclusive right to import vanadium oxide into Canada, but then decided, "within its area of discretionary powers," to use that right to conspire with a U.S. subsidiary to boycott and destroy a competitor. *Id.* at 706-07. The Supreme Court emphasized that there was "no indication that [any] official within the ... Canadian government approved or would have approved of" this conduct, and that no "law in any way compelled discriminatory purchasing." *Id.* Here, the Ministry not only approved defendants' conduct

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are significant trading partners of the United States and threatens to affect adversely the foreign policy of the United States. Mitnick Decl., Ex. B at 6.

The court of appeals erred in rejecting petitioners' sovereign compulsion defense. The Government of Japan explained in the MITI [Ministry of International Trade] Statement that it "directed" petitioners "to enter into" the check price agreement.... [T]hat explicit and detailed statement by a foreign sovereign that it mandated the check price agreement in accordance with its laws ... should have been given dispositive weight. It follows that the foreign sovereign compulsion defense precluded use of the check price agreement as a basis for liability under the Sherman Act. *Id.* at 12.

The MITI Statement also explained that MITI had directed the regulations [through] the Japan Machinery Exporters Association .... *Id.*

in establishing export limits and price coordination, it compelled that very conduct.

Similarly, plaintiffs do not-and cannot—allege that defendants entered into a price—fixing conspiracy, then worked to secure laws or regulations that blessed their arrangements. *Cf. U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (conspiracy formed in the United States for the purpose of monopolizing sales to the United States was not immunized simply because one element of the conspiracy involved securing laws that recognized the conspirators as exclusive traders and imposed discriminatory sales taxes on rivals). Here, the Ministry imposed the relevant laws on defendants. Indeed, the impetus for these and other price coordination measures was not to endorse existing price-fixing conspiracies, but to prevent disorderly competition.

In sum, Chinese Law mandated the participation of entities engaged in vitamin C export to coordinate with respect to export pricing and volume quotas and to adhere to such limits. Each defendant conducted itself as Chinese law required when it participated in Sub-Committee meetings at which agreements were reached with respect to pricing and volume controls. Refusal to subject oneself to the coordination of the Sub-Committee and the Chamber is unlawful under relevant regulations and would result in severe punishment, either through monetary penalty or loss of ability to participate in the industry altogether. Because all of the elements of the foreign sovereign compulsion doctrine are satisfied, this lawsuit should therefore be dismissed.

II. The Act of State Doctrine Also Mandates Dismissal

The act of state doctrine also forbids judicial inquiry into China's motives in regulating its foreign commerce. The act of state doctrine differs from the foreign sovereign compulsion defense in that the act of state doctrine is grounded in principles of federalism and reflects the view that the courts, in deciding whether to accord recognition to certain foreign acts of state, might hinder the conduct of foreign affairs by the Executive Branch. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990). The Supreme Court has acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). *See also Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434,448-49 (1979) and *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative— 'the political'— departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

The act of state doctrine, in essence, is "designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government. Such an inquiry is foreclosed under the act of state doctrine." *O.N.E.*

Shipping, 830 F.2d at 452 (*citing Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 508 (1977)). *See also W.S. Kirkpatrick*, 493 U.S. at 404.

The burden of proving an act of state rests on the party asserting the applicability of the doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684-85, (1976), *cert. denied, Saksand Company v. Republic of Cuba*, 425 U.S. 991 (1976). "[T]his burden requires that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest." *Liu v. Republic of China*, 892 F.2d. 1419, 1432 (9th Cir. 1989) (*citing Timberlane*, 549 F.2d at 607-08).

The act of state doctrine mandates that this Court decline to exercise jurisdiction over this action. As set forth above, the conduct alleged to have been violative here was compelled by the Chinese government. The Chinese government compelled such conduct in its oversight of its foreign trade regulation. Any determination by this Court into the conduct as alleged by the plaintiffs will necessarily invoke an inquiry into the legitimacy of China's foreign policy concerning the manufacture and export of vitamin C. To permit the validity of the policymaking decisions of China "to be reexamined and perhaps condemned by [this] court[] would very certain[ly] 'imperil the amicable relations between [the two) governments and vex the peace of nations." *Oetjen*, 246 U.S. at 304. It cannot be denied that the possibility of insult to China is significant — "the granting of any relief would in effect amount to an order from a domestic

court instructing a foreign sovereign to alter its chosen means" of regulating domestic conduct. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) *cert. denied*, 454 U.S. 1163 (1982). Such an inquiry is prohibited by the act of state doctrine — if China's regulation of its foreign policy implicates U.S. interests as alleged, then the proper forum for such discussions between the United States and China is not in this Court.

III. This Suit Should Be Dismissed Based on Principles of International Comity

Principles of international comity also render the exercise of jurisdiction over the Complaint inappropriate. Comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

O.N.E. Shipping, 830 F.2d at 451 n.3 (*quoting Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). The Second Circuit has adopted the multi-factor test set forth in *Timberlane* for determining when comity principles require courts to decline to exercise jurisdiction over the conduct of foreign actors. *See U.S. v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir. 1992) *cert. denied, Javino v. U.S.*, 506 U.S. 979 (1992);

O.N.E. Shipping, 830 F.2d at 451. Here, virtually all of these factors militate in favor of dismissal.

First, for all of the reasons discussed above, there is an irreconcilable conflict between the requirements of U.S. antitrust law and the laws and policies of China. *See Timberlane*, 549 F.2d at 614 (courts must examine "the degree of conflict with foreign law or policy"). Simply put, Chinese law mandates conduct that U.S. antitrust law proscribes. *See Trugman-Nash, Inc.*, 954 F. Supp. at 736 (dismissing on comity grounds after finding "actual and material conflict between American antitrust law and New Zealand law in respect of the marketing of dairy export produce"); *McElderry*, 678 F. Supp. at 1079 (dismissing on comity grounds based on "direct conflict between" U.S. antitrust law and the law of the United Kingdom). And that Ministry-mandated conduct, all of which occurs in China, is far more "importan[t] to the violations charged" than any "conduct within the United States." *Timberlane*, 549 F.2d at 614.

Accordingly, an exercise of jurisdiction cannot achieve "compliance" with U.S. antitrust law: as Chinese entities with their principal places of business in China, defendants cannot export vitamin Cat all if they do not comply with the laws of China. *See id.* (courts must consider the nationality of the parties and their principal places of business and the extent to which enforcement by either state can be expected to achieve compliance). This lawsuit, therefore, cannot compel defendants to conform their future conduct to the requirements of U.S. antitrust law, because they will remain subject to the Ministry's price-coordination requirements.

Those requirements of Chinese law, moreover, were not adopted with "the explicit purpose to harm or effect American commerce," nor were any such harms or effects reasonably foreseeable. *See id.* To the contrary, the Ministry adopted these requirements to prevent self-destructive price competition during China's transition from a state-run to a market driven economy. As a consequence, the "significance of effects on the United States" is far smaller than the significance of the effects in China. *Id.* The price coordination and production limits plaintiffs challenge lie at the very heart of the Ministry's efforts to oversee and facilitate a sweeping transformation of China's entire economic system. Whatever effects defendants' compliance with the Ministry's requirements has allegedly caused in the United States, those effects plainly do not implicate an historic transformation of the U.S. economy.

Finally, and as a consequence, punishing defendants (through an award of treble damages) for their compliance with mandates that the Ministry has deemed essential for the development of a stable market-driven economy can only adversely affect relations between the United States and China. *See id.* at 609 (noting that nations "have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts"); *Mannington Mills*, 595 F.2d at 1297 (warning against a "provincial approach" to the exercise of antitrust jurisdiction over foreign conduct and noting examples of hostile reactions by British and Canadian authorities to such exercises). Insofar as China's sovereign policy decisions about how best to manage its economic transformation conflict with the policies embodied in U.S. antitrust laws, that conflict should be addressed "through

diplomatic channels," and not through "the unnecessary irritant of a private antitrust action." *O.N.E. Shipping*, 830 F.2d at 454.

CONCLUSION

For all of the foregoing reasons, this Court should decline to exercise jurisdiction and should dismiss the Complaint.

Dated:

SIDLEY AUSTIN LLP
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APPENDIX F — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED DECEMBER 5, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-01738 (DGT) (JO)

IN RE: VITAMIN C ANTITRUST LITIGATION,

United States Courthouse
Brooklyn, New York
Friday, December 5, 2008
2:30 p.m.

TRANSCRIPT OF CIVIL CAUSE
FOR STATUS CONFERENCE

BEFORE

THE HONORABLE DAVID G. TRAGER
UNITED STATES SENIOR DISTRICT JUDGE

AND

THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

Court Reporter: Victoria A. Torres Butler, CRR
Official Court Reporter
Telephone: (718) 613-2607
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[3](In open court.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Please, be seated.

Okay. Who wants to start, if anybody? Otherwise, I'll tell you what my preliminary rulings are going to be and then, you can respond.

Would you prefer that?

ALL: Yes.

THE COURT: Okay.

Preliminarily, I'm going to grant this application, the indirect plaintiffs, to stay that. I also don't intend to act on the class certification motion until the next steps are resolved.

I always find these class certification money for lawyers a waste of everyone's time. If there's a case somehow that's settled and the plaintiffs and defendants agree to make the class as big as possible, and if I throw the case out then, suddenly the defendants want the class to be as big and the plaintiffs the other way. I find that just a big waste of time.

Now, on the issue of certification, I think you're wasting your time. I'm not going to grant it unless you agree that this is the following question: Unless, basically,

the defendants concede that they voluntarily or agreed among themselves to fix the prices and then down the road realized [4]they might have a problem and sought Government approval or ratification, which I think whatever it is has been given, and then that alone would provide a defense. Otherwise, it's a question of fact. I don't think it's appropriate to certify and I doubt the Court of Appeals would take a few more.

A few more points.

I was somewhat disturbed by the statement on page five and defendants' statements, I guess, filed by attorney for defendant Northeast, Greenberg Traurig. This defendant's statement in advance, a bunch of you have signed it. Yes, I guess all of you. I don't know.

On page five is the following statement, the paragraph at the top: "The parties should discuss the nature of further proceedings that the Court contemplates in order to address and resolve the issues that is identified in its opinion regarding the Government defenses, particularly in light of the fact that such issues relate to the truth of the representations of the People's Republic of China."

Now, I found that statement rather disturbing because I never challenge the truth. I know what the position of the Republic of China as represented in an amicus brief is, but as I as far as I know, there has been no affidavit. No Government official has come forward with knowledge of the facts to tell us exactly happened from the Government's point of view. As far as I can see, the sole

reliance is on the [5]so-called charter from The Chamber, which allowed them to fix prices or agree on prices from 1991, but suddenly nobody did that until 2001 when they were in a position to do it.

So, the issue, as far as I'm concerned, is I'm in no way attacking the truth, as you put it. I mean, that's the position of the Republic of China and I really do not appreciate, considering the importance of the case and the importance to the Republic of China, that kind of statement.

And the next one, even the next statement where it says: "Would not expect the People's Republic of China to be subject to discovery or a certiorari to be required to appear in this court to provide testimony."

Now, I may have said that, but that doesn't change the fact that this is an affirmative defense and the burden is on the defendant. So, I don't know how they're proposing to meet that defense without somebody from the Republic of China who knows something about this.

Okay. I have a few other comments since I've spent a lot of time on this.

I'm not sure what the relevance of the expert testimony is, if we're still dealing with what the Germans would call the grundfesten, the basic facts about what happened here, the question of whether it was authorized or not, that's a nice question of law, but until we resolve that basic fact, I'm not sure what the relevance is, but I just [6]would ask you to keep that in mind.

Now, what I think should be done next, I'll try to simplify this. You complete this discovery and then whatever is left and you file motions for summary judgment. And at that point, I'll make a ruling whether there's a question of fact. Or if I throw the case out, well, that will end it.

Anybody have any questions?

(No response.)

THE COURT: Comments?

MR. BOMSE: Yes, Your Honor. If I may?

THE COURT: Yes.

MR. BOMSE: Stephen Bomse, I represent the defendant Jiangsu Jiangshan.

THE COURT: Yes. You're not yet served; is that the other --

MR. BOMSE: No. No.

THE COURT: Okay.

MR. BOMSE: No, I was going to comment on Your Honor's comments.

THE COURT: Okay.

MR. BOMSE: I'm not going to, of course, try to persuade Your Honor to change his mind with respect to certification. And certainly, as far as we're concerned, we would not agree that that is the appropriate question to be certified.

[7]We've suggested what we thought those were and Your Honor has indicated that you're not --

THE COURT: You're wasting your time. Okay.

MR. BOMSE: So.

THE COURT: Saving your clients a lot of money.

MR. BOMSE: Well --

THE COURT: Okay.

MR. BOMSE: -- we are going to do that.

THE COURT: All right.

MR. BOMSE: We are, we are eager to do that, of course, and we really do think that the question is: How do we get to resolution of what we've called the Government defenses, which are the central issue in the case because I don't think there really are disputes of fact in the sense of plaintiff's say X happened and we say Y happened.

You have in front of you not only pleadings, but documents, some of which you referred to. And those

documents, leaving aside questions that might arise as evidentiary matters, we assume would be before you. The question is, is what is the legal significance of that?

And our view, and I think we differ respectfully with Your Honor on this, is that have what you do have before you are statements of the Government of China, which represent its official statement.

THE COURT: Its position.

[8]MR. BOMSE: Yes.

THE COURT: But you referred to it, and it really annoyed me, is that I was questioning the truth of their representation. I know what their position is, but this has nothing to do with truth. I know that this is their position.

MR. BOMSE: Well --

THE COURT: The implication of this statement is that I was questioning their position. I know what their position is.

MR. BOMSE: Well, then.

THE COURT: But nobody there has said that, in fact, that, you know, that provided either an affidavit or a legal brief -- not a brief -- a basis for that statement.

I understand what their position is, but I don't know how you're going to meet the affirmative defense unless

you offer something more, other than the statement that they authorized it.

MR. BOMSE: Well, it is our view that the brief that they submitted constitutes a statement of the law. It is presented in the way that such matters are presented to courts when a foreign government wishes to make its views known as the Chinese Government did here.

And in fact, I think the law -- well, I don't want to talk about the law -- but that is my understanding as to the standard procedure for a foreign government to make its [9]views officially --

THE COURT: Its views. Fine.

MR. BOMSE: But when I use the term "views," it is, in effect, an evidentiary statement. Not in the sense that if a witness were there --

THE COURT: I may be wrong. I don't want to waste a lot of time. If you can find some authority for that.

My recollection of some of these other cases involving where the compulsory action governments take positions about what the view is, you know, they make a complete record on it. You know, not just their quote, statement. Like in the, I think, the Australian case. The Government there made very clear what the laws were and what their position were and how there was no question.

Here we have a serious question being raised about whether, in fact, the Government was at all involved in this. And then, you're left with this whole position that, you know, the fact that this committee exists, that makes it legal. And that's all that's required.

And if you want to rest on that, fine.

MR. BOMSE: Well, Your Honor, again --

THE COURT: All right. There's no point, okay? I spent a lot of time on the motion to dismiss. I'm not certifying the question and you'll have to figure out what posture you want to take.

[10]Also, I have to tell you, it's a little bit disturbing that, you know, I haven't been involved in the discovery, but an amicus curiae; it's one thing to present their position, but I remember in one of these instances there was a discovery issue in which one of the parties, I forgot already the circumstances, appealed.

And suddenly you, I assume you represent the Chinese Government.

MR. BOMSE: I do not, Your Honor.

THE COURT: They do (indicating).

They, too, took an appeal. And I thought you're an amicus curiae.

MR. MITNICK: Joel Mitnick, Sidley Austin, on behalf Of the Ministry of Commerce.

We have not taken an appeal.

MAGISTRATE JUDGE ORENSTEIN: No, no, no. I think what Judge Trager's referring to and please, anyone correct me, it's been a while since I reviewed it also.

At the initial appearance before me when we discussed the stay of discovery, the Ministry, through Counsel, appeared as amicus and said it took no position. It had no stake in the matter.

When the defendants, disappointed by my ruling on that took an appeal, the amicus -- and Mr. Mitnick, please do correct me if I'm wrong -- the amicus weighed in not taking an [11]appeal, but weighed in on the defendants' side on the same position that it said it had no view on when it was before me.

MR. MITNICK: I understand, Judge Orenstein, what you're referring to now.

At the very -- if I may explain?

THE COURT: Yes.

MR. MITNICK: At the very first hearing in this matter that the Ministry attended -- it may have been the first hearing, it was certainly the first one the Ministry attended, it was before Judge Orenstein -- the Ministry

had not yet appeared before Your Honor and had not yet submitted an amicus brief. In fact, had not yet received permission to file an amicus brief.

At that hearing, we were appearing, I was authorized to appear simply to explain that the Government of China considered this a sufficiently important case that it was going to seek leave to file an amicus brief.

I was then asked if the Government of China had a view on whether there should be a discovery stay. And I said it did not, which it did not at that point. The Government did not want to get involved in anything procedural. It wanted to get involved in the amicus brief.

Subsequently, there came a time after the Government put in its amicus brief where it reconsidered its decision. And Judge Orenstein asked if there was any fact that had [12]changed in the interim. And I believe my response was there was no fact that changed, other than the Government believed its posture in the case was different having now put its official statement before the Court. And it felt, as a foreign sovereign, that having put its official statements before the Court, it would be appropriate to resolve that issue before putting its citizens to a burden of discovery.

But that is the only extent to which we've been involved in an appeal of anything by the defendants. The Government has tried to stay out of procedural issues in the case.

THE COURT: Okay.

MAGISTRATE JUDGE ORENSTEIN: May I just follow up?

THE COURT: Yes.

MR. MITNICK: Forgive me if this goes a little off-track.

MAGISTRATE JUDGE ORENSTEIN: Just so I understand the Ministry's position.

When you first sought leave to appear as amicus, you essentially said -- and I'm paraphrasing, so please correct me -- that you were essentially neutral on the issues before me and were appearing as a friend of the court.

And then, I later found out, and this came up at a hearing that for reasons sufficient to yourself you did not attend, that even before that point, you had -- your client, [13]rather -- had attended at least or even organized a joint defense meeting, which I thought was somewhat inconsistent with the representation that had been made earlier.

Am I missing something?

MR. MITNICK: I think that you are, with all due respect. And I would agree with you that it would be inconsistent.

I don't believe at that first hearing, and I should say I've gone back to look at the transcript, I don't believe that

I made any representation that the Ministry was neutral. The Ministry was appearing in the typical friend-of-the-court fashion.

What I indicated I believe -- I thought clearly, and I apologize to the extent it evidently wasn't clear -- is that the Ministry was appearing in this case in the form of an amicus curiae solely because that is the basis on which a foreign government --

THE COURT: Okay.

MR. MITNICK: -- has been directed by The State Department to appear. But that our purpose in appearing was as a government supporting companies within its government that were complying with the rules that it had promulgated. And therefore, it had a very strong interest aligned with the defendants in the case.

And I believe I specifically said it had two [14]interests. One interest was aligned with the defendants, which was to resolve this particular case with these defendants in a way that demonstrated that they were simply following their government's orders.

And then, secondly, it had an independent interest, which was beyond this case because it was patently obvious at that time that Counsel for the plaintiffs in this case were already involved in bringing additional antitrust cases against other industries.

And so, there was an antitrust principle that the government was interested in establishing that was independent of the defendants' interests in this case. But I went out of my way to indicate that there were two interests.

I also did one other thing that I thought was, that was intended to make the point of alignment, which is that if Your Honor may remember, I specifically sat behind the bar until the defendants sat down, the proceedings began and I had asked Mr. Bomse to please ask the Court if I could join the defendants at the Counsel table, which I had intended as a visual and physical indication of alignment with interest.

To the extent that the amicus brief didn't convey that joint interest, I certainly apologize. It was certainly intended to.

MAGISTRATE JUDGE ORENSTEIN: Okay.

Is there a joint defense agreement among the [15] defendants?

MR. MITNICK: Yes.

MR. LABATINE: Yes, Your Honor.

MR. MITNICK: Among the defendants, and the Government, and The Chamber.

THE COURT: Okay. Well, it's too early, but how do you become party to a joint defense where you're not being sued?

MR. MITNICK: Because there is, we believe there is a common legal interest in being able to vindicate the regulatory structure in which the defendants and the government are working together.

It would be impossible, I think, for the defendants to go forward in this case having, as we argue, been compelled to be involved in this case without some level of coordination with the Government.

THE COURT: Okay.

MR. MITNICK: So, at the beginning --

THE COURT: All right. I'm not dealing with that issue today. So, I want to, I'm just educating myself since you've been dealing with Magistrate Judge Orenstein most of the time and I was focusing on the motion.

All right. I think that pretty much resolves any pending issues.

* * * *

APPENDIX G — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MARCH 5, 2013

[954]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC)

IN RE:

VITAMIN C ANTITRUST LITIGATION,

Plaintiff,

-against-

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

United States Courthouse
Brooklyn, New York

Wednesday, March 5, 2013
9:30 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT COURT JUDGE

Appendix G

Court Reporter: Mary Agnes Drury, RPR
Official Court Reporter
Telephone: (718) 613-2615
E-mail: Mad78910@yahoo.com

***

[1085](Jury is in the courtroom at 3:19 p.m.)

THE COURT: All be seated, please.

Continue, Mr. Isaacson.

CROSS-EXAMINATION (Continued)

BY MR. ISAACSON:

Q Sir, at some point you said you had various positions with the vitamin C subcommittee, I think you said it included deputy chairman or chairman?

A Yes.

Q And you were selected as chairman by a vote of the subcommittee council, isn't that right?

A Yes.

Q Now, that 1997 charter that we were looking at, that charted was adopted after a discussion and vote by the vitamin C companies and trading companies, right?

A Yes.

Q The 2002 charter was based by a vote of vitamin C companies also, right?

[1086]A Yes.

Q The 2002 charter was passed at a meeting that covered all or parts of four days, right?

A In principal in a meeting that charter was passed, and then the membership took them home and then make some corrections and then submitted it and then there were some -- there were modifications.

Q All right. At that first meeting where it was passed in principal, that was a -- that was a meeting that covered all or part of four days, right?

A Didn't need four days to pass this.

Q Okay. The binder there, sir, if you could show him Exhibit 37. The Chinese may be on the back of the document and this is a VC conference agenda that was provided in this litigation by NEPG. And there is some handwriting on the document, and so please ignore the handwriting, but with respect to the printed agenda, was that an agenda that you prepared?

A Yes.

Q All right.

MR. ISAACSON: I move to admit Exhibit 37.

MR. MASON: No objection.

THE COURT: All right. That's received without objection.

(Plaintiff Exhibit 37 was admitted into evidence.)

[1087]Q I don't know how to say this in Chinese, but you are identified as a master of ceremonies in the upper right-hand corner. Does this remind you that these -- that this charter was passed in principal as part of meetings that took place over at least parts of four different days?

A Yes.

Q All right. And then --

A Three days. Three days. The first day was reporting and, in fact, the meetings took only two days.

Q 15 companies voted for this charter, right, both large and small vitamin C companies?

A At the time by principal it was passed but it was not by vote.

Q Sir, 15 companies voted for this new charter after it was sent to them, right?

A Yes.

Q And all the vitamin C manufacturers had input on the charter at the meeting?

A Yes.

Q You testified yesterday or today that the Ministry of Commerce determines the salary level of the people who work at the Chamber, do you remember that?

A Yes.

Q All right. In fact, what happens is the Ministry of Commerce approves the total amount of all the salaries of [1088]Chamber employees, right?

A Yes.

Q The -- you testified earlier today about how you would chop contracts and you would chop them -- you would look at whether they were lower than the minimum price, and if they weren't, you would chop them by the price, right?

A Yes.

Q Can we see that one contract on the screen? This is one page from Plaintiff's Exhibit 386A, which has been admitted. Is that an example of a chop in the pricing area of a contract?

A Yes.

Q Okay. That's the chop that you would do?

A This is chop.

Q And in order to sell vitamin C in the United States, the companies would have to get the chopped contracts back from you, right?

A Yes.

Q All right. I want to show you what's been admitted as Plaintiff's Exhibit 386. And I won't ask you to read or analyze all of these, I will tell you these are Weisheng vitamin C contracts that are part of the sales to the United States that are at issue in this case. And you look for yourself, but we've been unable to find a chop on any of these contracts. Take a look for yourself.

[1089]A There's none.

Q Do you have an explanation for that?

A The company takes the chopped contract from us to report to customs, and then the customs would take away the chopped contract that we chopped. The chopped contract would never have reached the customers hands.

Q Sir, let me be clear. These are not customer contracts, these are the contracts Weisheng provided us, okay. We did not obtain these from US customers, we obtained these from -- these are Weisheng copies, all right.

Do you have any explanation as to why Weisheng would have so many contracts without chops?

A Then those did not report to the customs and exported.

Q So any contracts that Weisheng has -- that Weisheng has, not the customers, without a chop, were contracts that were not reported to customs?

A Yes.

Q This is 427. These are Hebei Welcome contracts.

THE COURT: You may approach, Mr. Isaacson.

MR. ISAACSON: Thank you.

Q Those are all contracts to the United States that were provided by Hebei Welcome, not customers. Unless we've missed something, they don't have chops. Is your testimony the same that any contracts without chops were not reported to customs?

[1090]A Correct.

Q Exhibit 52 in that binder, sir. This has previously been admitted into evidence. I'd ask you to put that on the screen, Trevor. You drafted Exhibit 52, right?

A Yes.

Q And you see, you wrote a number of times in this document that this document was discussing industry agreed export prices. Do you see that in the title?

A Yes.

Q Do you see that in the first paragraph?

A Yes.

Q Do you see where it says in item one, the agreed prices are the minimum prices?

A Yes.

Q And above the chart on the second page there is a title?

A Yes.

Q List of export prices of commodities reviewed by customs and agreed by the industry for obtaining export preauthorization stamp from the Chamber, the export preauthorization stamp, that's the chop, right?

A Yes.

Q You're the one who wrote all these times that these prices were agreed prices, right?

A Yes.

[1091]Q And you left vitamin C blank in this document because the market price at that time was much higher than $3.35, right?

A It was much higher than $3.35.

Q And you didn't want to write that down because the vitamin C companies were charging more than 3.35 and you didn't want to pull down the prices?

A Yes.

Q Now, you submitted a minimum price for vitamin C exports to customs -- I'm done with Exhibit 52. I'm sorry, I don't want to confuse you with that.

INTERPRETER: Thank you.

Q You submitted a minimum price for vitamin C exports to customs on two occasions in 2002 or after, right?

A Yes.

Q And you submitted it to customs on a computer disc. The first disc you submitted a price of $3.25, and in July of 2002 you submitted a second disc with the price of $3.35.

INTERPRETER: Repeat the first one.

Q In July of 2002 you submitted a second disc with the price of $3.35 per kilograms?

INTERPRETER: What was the first one?

MR. ISAACSON: He already answered the question.

INTERPRETER: No, I may have mistranslated it.

Q All right. I'll go back over it. The first disc you [1092] submitted had a price of $3.25?

A Yes.

Q All right. And then in July 2002 you submitted a second disc with a price of $3.35?

A Yes.

Q You only submitted two discs after 2002, I'm sorry, that had a vitamin C price?

A Yes.

Q You never submitted a disc with $9.20?

A I also gave customs $9.20. Okay. But they – the customs did not really check that, he just look at whether there is a chop or not.

Q All right. Sir, let's get this straight. You only submitted -- after 2002 you only submitted two discs to customs that had a vitamin C price?

A Two times or maybe three times, it could be three times. It could be three times.

Q All right. Sir, page 122 of the deposition, line 13 to 16. Trevor?

A Last time I said two times, I know that. You don't have to show me. The last time I did say twice.

Q The last time you did say twice. In fact, you even told me that customs stopped asking for the disc in 2003 and 2004, right?

A Yeah, because they don't examine it.

[1093]Q You never submitted a disc with $9.20, did you?

A I must have. I must have, but they don't examine it. They don't examine it.

Q That's entirely new testimony today, right?

A Yes.

Q Now, no company was -- no vitamin C company was ever punished for charging less than $3.35 per kilogram, right?

A Under $3.35. The key point is I would not have discovered it.

Q Okay. But my question is: No company was ever punished for charging less than $3.35, right?

A My Chamber never received any contract that was under $3.35. After all -- after -- from August of 2002, the Chamber never received any contract that was under $3.35.

Q I understand what you are saying about receiving contracts. My question is very simple: No company was ever punished for charging less than $3.35, right?

A Yes.

****

APPENDIX H — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MARCH 12, 2013

[1520]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-01738 (BMC)

IN RE:

VITAMIN C ANTITRUST LITIGATION,

Plaintiff,

-against-

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

United States Courthouse
Brooklyn, New York

Tuesday, March 12, 2013
10:30 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

Appendix H

[1521]Court Reporter: VICTORIA A. TORRES BUTLER, CRR
225 Cadman Plaza East
Brooklyn, New York 11201
VButlerRPR@aol.com

[1522](In open court.)

(Judge BRIAN M. COGAN enters the courtroom.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE COURT: Have a seat, please.

All right. How would the parties propose to proceed now?

MR. CRITCHLOW: Your Honor, defendants would propose to address Rule 50 motions first.

THE COURT: Okay.

MR. CRITCHLOW: Which is what you suggested yesterday.

THE COURT: Okay, go right ahead.

MR. PRESCOTT: Good morning, Your Honor.

In light of changes in our ranks, Mr. Critchlow and I will be sharing the speaking to the Rule 50 motions.

THE COURT: Okay. These oral motions, as I'm sure you know, are generally not lengthy.

MR. PRESCOTT: Indeed.

THE COURT: Okay.

MR. PRESCOTT: And they will be oral only.

THE COURT: Okay.

MR. PRESCOTT: I'm sure the Court is aware of the standard under Rule 50(a) that we are now looking at; whether [1523]a reasonable jury would have a legally sufficient evidentiary basis to find for the party on an issue. This is not quite the summary judgment standard anymore.

The first issue I would like to raise is the issue of the damages that are attributed to the two alleged co-conspirators, Tiger and Hualong.

Now, we heard testimony yesterday that there is simply a complete absence of evidence in the record as to whether those, the contracts of sale by those two entities to U.S. customers had arbitration clauses or not, so we cannot ascertain and no one has ascertained whether they fall within the scope of the class. Therefore, too, and I mention as Dr. Wu mentioned, that for the other defendants an expert was hired for two of them to review all the contracts, see if they had arbitration clauses, for

two of the other defendants they produced their contract lists indicating with or without arbitration, but for Tiger and Hualong it is simply unknown.

Proving damages is the plaintiff's burden and we are at a point where there is nothing in the record, it is simply guesswork, and to strike that portion of plaintiff's damage claim would clearly meet the Rule 50 standard.

THE COURT: I'm not sure what you're asking for.

Are you asking me to reduce the $54.1 million damage claim by a certain amount?

MR. PRESCOTT: Yes. By 7.5 million.

[1524]THE COURT: All right.

MR. PRESCOTT: Which is the amount attributable to Tiger and Hualong sales. That's only evidence of their sales in the record.

THE COURT: Okay.

MR. PRESCOTT: And it's in Dr. Wu's testimony.

If it helps, it's this bar chart from yesterday.

THE COURT: Right.

MR. PRESCOTT: The second round for a Rule 50 motion I'm sure does not surprise the Court, and you've heard it before, it is the Act of State doctrine.

Appendix H

Very recently, just in December, the Second Circuit has expounded on the doctrine in the *Konowaloff* case. It is 702 F.3d 140 starting at 145. If it's of any help, I have a printout for the Court and for Counsel.

THE COURT: I'd like that, thank you.

(Handing.)

MR. PRESCOTT: And it, the Second Circuit in December of 2012, repeats the well-known doctrine. It's on page four of the Lexus printout.

THE COURT: It's a very different context; isn't it?

MR. PRESCOTT: It was a seizure by, of property by the, by the former Government of the Soviet Union, of Russia.

THE COURT: Right, I remember the case.

MR. PRESCOTT: However, the Court says, Second [1525]Circuit says when it is made to appear that the foreign Government has acted in a given way, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts.

Also, the doctrine has been recently discussed by Judge Stein in a case in which I happened to also be involved. It's the *Republic of Iraq against ABB, et al.*, Southern District, filed February 6th, 2013.

THE COURT: Yes, I read that case.

MR. PRESCOTT: And I would point out that this, the Court, including Your Honor and the Magistrate Judge, and we submit the huge weight of the unrefuted evidence show that the Chamber was an agency of the Government of China.

This is not an issue that we have injected into this case. The reference to the Chamber of Western Medicines was in the case from the day the first complaint was filed, well nigh eight years ago, and there is no way to send this case to a jury without instructing the jury that it is to sit in judgment on the credibility of a former Chinese government official, Mr. Qiao.

So, on Act of State grounds, we would also submit that it is time now to dismiss this case under Rule 50.

THE COURT: But I thought the whole reason Mr. Qiao was allowed to testify was because, in fact, he is a former official and what was communicated to me by the defendants [1526]previously was that it is as a result of his being a former official that he became available at a late date to testify.

Now, if that's true for sovereign immunity purposes, you're claiming that he can still fall within Act of State and it would violate the Act of State doctrine to allow a jury to determine whether his perspective on what happened in his interactions with the defendants is credible or not?

MR. PRESCOTT: Yes, Your Honor.

Because as we were told, and as we informed the Court he's no longer, he's now retired; however, he was testifying

to the time period when he was an official at the Chamber reporting to MOFTEC and then to MOFCOM. He was testifying with regard to the time when he was acting in his official capacity. That is our view there.

Finally, and I'll turn it to Mr. Critchlow, we believe on the issue of compulsion by Mr. Qiao that all that has been presented is innuendo, testimony from people who were not present at any of the events and reading against them portions of documents. So, we would ask, also, for a Rule 50 dismissal on the compulsion ground.

We have one other point, which Mr. Critchlow will address. Thank you.

THE COURT: All right, thank you Mr. Prescott.

MR. PRESCOTT: Thank you for your time.

MR. CRITCHLOW: Thank you, Your Honor.

[1527]The final Rule 50 motion concerns North China Pharmaceutical Group Corporation. The issue that's being framed for decision to go to the jury is whether Group Corporation entered into an agreement with competitors to fix prices. It's not whether they had a website that says they sell vitamin C. It's not whether they received or may have received a few reports reporting on sales of vitamin C. The issue is whether Group Corp knowingly entered into an agreement by an authorized representative to fix prices. And the issue, the standard is whether a reasonable jury could have a legally sufficient basis to determine that such agreement was entered into by Group Corp by a preponderance of the evidence.

So, what is the evidence here? The evidence here is that in November of 2001, the agreement that is alleged to have formed the conspiracy was signed by Hebei Welcome. Not by Group Corp, we have the document in the record. I think it's trial Exhibit 26. Defendant Trial Exhibit 26. But anyway, we have that document in the record, it's signed by Welcome. All of the minutes of the Chambers meeting that Mr. Wang Qi put in the record -- and I think there are roughly twenty -- all identify Hebei Welcome as being at the Chamber meetings.

In resect of Mr. Huang, there are six minutes, also by I believe Mr. Wang Qi, that identify Mr. Huang as [1528]representing Hebei Welcome. There are no documents in the record, no documents in the record that identify Mr. Huang as representing anyone else. None. Except for the statement in the Chamber website that we looked at in the summary judgment motion where Mr. Qiao admittedly identified Mr. Huang as a deputy general manager of Group Corp, but Mr. Qiao testified that he did that for purposes of honoring Mr. Huang, for purposes of referring to his highest title and Mr. Qiao, unequivocally stated that he had no doubt in his mind when he was dealing with Mr. Huang that he was dealing with Mr. Huang as a representative of Group Corp.

In addition, if you look at the bylaws of the Chamber and the membership list of the Chamber, the member is identified as Hebei Welcome. The member of the subcommittee is identified as Hebei Welcome. The eligibility for serving as a rotating chairman or serving on a subcommittee is conditioned on representing a manufacturer member. And all of the minutes in respect of the election of the rotating chairman identify that post

is rotating among companies, including the rotation to Mr. Huang.

So, Your Honor, there are a couple of things on one side of the scale I would submit to Your Honor that they've got a couple of feathers and they've got a couple of sticks, but on the other side of the scale there are a ton of bricks -- documentation, records, requirements -- that all say [1529]that it was Hebei Welcome that entered into these agreements. And therefore, I think that under the standard that we're looking at now, which is different from the summary judgment standard, that granting the Rule 50 motion is appropriate.

Thank you, Your Honor.

THE COURT: All right, thank you.

I'll hear from plaintiffs.

MR. ISAACSON: With respect to the damages issue, Your Honor, Your Honor has ruled on this issue previously and for the reasons stated in our briefs at the time and the Court's ruling, this is properly an issue to be submitted to the jury. We never felt that the burden should be on us to show these arbitration clauses.

However, we think the Court's ruling is bolstered and has been made stronger at the trial because the issue for the jury is whether a reasonable economist would, what they would do with this issue in estimating damages. Dr. Bernheim testified that in that the lack of documentation, in his opinion, it was appropriate to estimate the damages at 54.1 million.

What we found out from the testimony of Dr. Wu is he received an instruction to exclude these, instruction from Counsel to exclude these items from the damages calculation. So, at this point, we think that this issue is more than sufficient to go to the jury based on what's happened since [1530] the Court's ruling.

THE COURT: Let me ask you this. Was there any reason why either party could not have subpoenaed at least the U.S. customers of Tiger and Hualong and gotten copies of their template contract to see if there's an arbitration clause?

MR. ISAACSON: I don't have any reason why either party can't issue a subpoena in the United States.

THE COURT: But I mean, that evidence would have shown one way or the other if there was an arbitration clause or not.

MR. ISAACSON: Correct.

THE COURT: Right.

MR. ISAACSON: We would point out that defendants' evidence is that, I mean, obviously Hualong and Tiger are at some of these meetings and it's defendant's evidence that Chambers has power to require them to submit documentation, the evidence has shown that the Chamber was actively involved in the defense of this case and so, our expectation is that if such documents existed, they would have appeared in the case.

THE COURT: Okay. Thank you.

MR. ISAACSON: All right.

With respect to the Act of State doctrine, I think the Second Circuit decision says the same thing as *W.S. Kirkpatrick* of the Supreme Court where the issue is, is the Court going to say that something that the Government of [1531]China did was unlawful? The Second Circuit case says the lawfulness of the Soviet Government's taking of the painting is precisely what the Act of State doctrine bars.

We are not asking the Court to pass on the lawfulness of any actions of the Chinese government. In fact, we are actively disputing the involvement of the Government of China in the facts of this case.

There is no, with respect to this issue that the Chamber is a Government agency, that is actually -- that would be contrary to the Court's summary judgment decision and there is actually no witness who has uttered the language that this is a Government agency. They call it subordinate and indeed, Mr. Qiao Haili's opening testimony was he was assigned to the Chamber.

This jury will not be sitting to judge the credibility of the Chinese government or of a former Government official because what we will be arguing is that this gentleman did not actually give any directions.

Appendix H

The jury will not be asked to consider the lawfulness of directions of the Chinese government. We will be saying that no such directions happened from the Chinese government and we will challenge the credibility of people who say that the Chinese government had actually any involvement in this.

In any event, we think that the Act of State issue [1532]was resolved by the Court's summary judgment motion and for the reasons stated in the briefing then and in the Court's decision, we don't think there's any basis for that.

On the issue of compulsion and innuendo, it being mere innuendo, we have put in a substantial documentary record that this wasn't a matter of compulsion, this was a matter of voluntary agreement and we will be going through that in closing argument. But the Court, I think, also dealt with this issue and reviewed this record at summary judgment and we briefed it then.

Now, with regards to North China. The Court obviously ruled on this on summary judgment and we think the Court got it right, and we think the evidence is now stronger with respect to North China's participation in the conspiracy than it was at the time. And we think, at a minimum, there is a genuine issue of material fact for the jury, particularly concerning the dual role of Huang Pinqi at Hebei Welcome in North China.

Now, as the Court knows; first, he was elected to head the vitamin C subcommittee in 2005 and had the

leadership position of that vitamin C subcommittee all throughout that year and attended conspiracy meetings during that period.

During that period, secondly, Mr. Huang operated exclusively from North China beginning in November 2003. That's where he had his desk, that's where he had his office, [1533]North China Group Pharmaceutical Corporation, and what we now know and was not discussed in the summary judgment decision is plaintiff's Exhibit 111, which was sent by Mr. Huang, this is now -- he's not with North China yet -- it's sent to the chairman of North China. A document that describes the conspiracy, that describes the all different issues about vitamin C, and that actually talks about the importance of groups and support of the groups to Hebei.

So, at a minimum, Mr. Huang Pinqi, reporting and acting on behalf of North China at that point and through PX 111, would also support submitting this issue to the jury.

In addition, once he moved to these offices, this would be the third point, is that he received at his North China Group Pharmaceutical Group Corporation offices detailed reports of Hebei's Welcome's vitamin C business such as Plaintiff's Exhibits 119 and 306. These reports are specifically addressed to the Group Corporation, they include information about vitamin C production, sales targets, strategies, et cetera. They also refer to the agreements on productions suspension.

Again, these are reports to Mr. Huang Pinqi while working for the corporation about the status of agreements and the status of the vitamin C industry, which means when he's attending vitamin C subcommittee meetings during the same period, there is a viable issue for the jury that he is acting [1534]on behalf of the company where he goes to work every day, where this is a matter of some -- and a company to whom this is a matter of some importance.

In fact, the testimony, which was not at an issue at summary judgment, is that it's Chinese custom to consider people and refer to people by their highest titles. It becomes implausible that when this gentleman is working for the highest entity, North China, and he walks into a meeting that everybody is sitting there thinking of his by his lowest title. That is a viable issue that the jury needs to resolve.

The evidence is extensive that North China Pharmaceutical Group Corporation was concerned with, and keeping its eye on, and is monitoring vitamin C and vitamin C production issues, which means that when he's got two hats, the North China hat, the vitamin C is very important to the North China hat; all of which again, makes it an issue for the jury to resolve as to which hat he is wearing at these meetings.

And that's where all the Exhibits from the websites and the other documents and from the business documents talking about vitamin C and North China are involved, including PX 111, which refers to the importance of the

North China brand name to Hebei Welcome, the evidence that from Mr. Huang that NCPC was responsible for strategic negotiations with the Dutch company DSM.

[1535]I mean, here they want to argue to the jury that North China Pharmaceutical Group Corporation was just an investment company and had no involvement with vitamins. At the same time, the gentleman admitted that it was North China that was handling strategic negotiations, including potential joint ventures about vitamin C, which I think led to an agreement but not a contract, according to his terms, which again makes it a jury issue as to who this gentleman is acting beyond, because it's not plausible that he's in high-level strategic negotiations about vitamin C with a Dutch company, but when he goes to a vitamin C subcommittee meeting that he is not wearing his North China hat.

There are documents, the majority of the JJPC documents, the large majority referred to him as being from Hebei but there are documents referring to North China being at those meetings or referring to their vitamin C competitor as being North China. That would include PX 259 and PX 144.

So, for all those issues, reasons, we think that this is an issue for the jury. The Court got it right and the strength of the evidence, the strength of the position that this is for the jury to resolve remains -- has become stronger.

And then, at the point, I think we're obligated to make a motion at this point, too, if you want to hear that.

THE COURT: Really?

[1536]MR. ISAACSON: Yes.

Because this comes about because the Court indicated that it was considering taking this verdict as an advisory verdict, all right, which I think makes us obligated at this point, potentially obligated, to make a directed verdict motion under both Rule 50 and Rule 44.1, at least with respect to parts of the case.

We understand the Court would want an advisory jury verdict and would want to reserve decision on this motion, but to protect our ability to make this motion after trial, we think we ought to put it in the record that for the reasons that the Court stated in its Rule 44.1 decision, the summary judgment decision and our briefing with respect to that, that the Court would be correct that we are entitled to judgment as a matter of law with respect to the compulsion defense and with respect to the conspiracy points with respect to Hebei -- with respect to Hebei. We understand that North China with respect to conspiracy would still be a disputed issue of fact.

And the basis for that are what we've set forth previously, but to summarize for the record, during the trial there's been no evidence from November 2001 to June 2006 that the Ministry of Commerce directed Mr. Qiao to require minimum prices of 3.35, prices higher than 3.35, export volume limits, production stoppages or a common warehouse. During that period the Ministry of Commerce did not discuss specific [1537]prices with

Mr. Qiao. The Ministry of Commerce stopped attending vitamin C subcommittee meetings by November 2001 and until the lawsuit was filed. And at some point after the lawsuit was filed, the company stopped their phone calls where they fixed prices and the vitamin C subcommittee stopped meeting.

Even if the Government had given instructions to Mr. Qiao, the companies base their whole case for compulsion on verification and chop because we know that before verification and chop, there were price wars in the 1990s and 2001; that after verification and chop ended in May 2008, that Mr. Qiao said there were no more agreements or authority to enforce agreements. And we know that the defendants argue that Penicillin, in the Penicillin subcommittee, there was no authority over those people because there was no verification and chop.

THE COURT: I'm sorry, does this go to your argument that I ought to be granting directed verdict as a matter of law as to the defendant's affirmative defense of compulsion?

Is that what this is?

MR. ISAACSON: Yes.

THE COURT: Okay.

MR. ISAACSON: Yes. I suppose it also could be considered reply to their motion on the same thing, saying all we have is innuendo.

[1538]THE COURT: Right.

MR. ISAACSON: The illegal conspiracy agreements were not compelled by Mr. Qiao or anyone else. The documents show discussions followed by voluntary agreements that no one ever order the companies to charge more than $3.35, that the chitchat price fixing was not ordered. The charter showed that the vitamin C subcommittee was a voluntary organization and Mr. Qiao testified that they were passed by a vote of the members and the evidence, which was also dealt with in the summary judgment decision, on how the companies broke their agreements.

Verification and chop does not constitute compulsion because verification and chop enforced voluntary agreements.

The companies ignored or evaded verification and chop and, in any event, the most the evidence could say is that verification and chop applied to $3.35, which was an agreed-to price.

The evidence also shows companies were free to agree to cancel or lower minimum prices. The documents show Qiao Haili asking questions, not giving orders. No documents show Qiao Haili giving instructions or issuing orders before the lawsuit was filed. And even the company witnesses said over and over again that the Chamber made requests. They also said the Chamber made directions, but they use the term interchangeably.

[1539]We understand, as we said, that the Court is considering taking the jury verdict as advisory, so we feel we needed to make those statements at this time.

THE COURT: All right.

Mr. Prescott.

MR. PRESCOTT: May I have 30 seconds on the first two motions?

THE COURT: You may have 60.

MR. MASON: Thank you.

The Court asked with respect to the Tiger and Hualong issue whether either side in the case could have simply subpoenaed the customers of Tiger or Hualong in the United States.

It is the plaintiff's burden to prove their damages. That is what the Court's proposed jury instruction so states at page the 27 and 28. That is well-worn law. The defendants do not have that burden. There is complete absence of evidence in the record on that point.

On the Act of State issue the Court may recall that shortly before trial the plaintiffs asked the Court to, in effect, rewrite one or two decisions of the Magistrate Judge in which he stated that the Chamber was an agency of the Chinese government.

In addition, I would point the Court to page 45 of its September 6, 2011, decision, at which the Court accepts [1540]the Ministry's explanation for the relationship between the Ministry and the Chamber.

And with the Court's permission, Mr. Critchlow will address the point Mr. Isaacson has raised and may wish to speak further on the Group Corp issue.

THE COURT: When you say the point that Mr. Isaacson has raised.

MR. CRITCHLOW: I believe the advisory jury point, Your Honor.

THE COURT: All right.

MR. CRITCHLOW: So, briefly as to Group Corp. I guess all I can do is repeat that the issue is whether Group Corp entered into an agreement with competitors to fix prices.

The documents that Mr. Isaacson cites in the nature of reports, which are or full-year reports or half-year reports contain no requests for direction from Group Corp, no indication that any direction from Group Corp was given, no indication that Group Corp itself actually entered into agreements which was clearly done at the Chamber level, according to the various minutes and, in fact, the only signed agreement that we have in the record.

Mr. Isaacson had cited two Jiangsu documents which I believe he says that indicate that Group Corp participated in meetings. If you look at one of them, which is the one of the [1541]two which purports to be notes not by Mr. Wang Qi but by Mr. Wang Qiang, you will note that it does say North China Pharmaceutical Group Corp. And next to it, it has the name Zhang Yingren.

The testimony is undisputed in the record that Mr. Zhang Yingren was solely an employee of Hebei Welcome, had no responsibilities whatsoever at Group Corp and I would submit to Your Honor that Mr. Wang Qiang simply got it wrong. That document can't stand in view of that testimony. And the other document is actually linked to that meeting, refers to the same thing.

And so, for those reasons, I still believe, Your Honor, that the overwhelming weight of the evidence, the standard that needs to be looked at in a Rule 50 motion which is not the Rule 54 motion but asks whether a reasonable jury under the appropriate legal standard could find based on a preponderance of the evidence that Group Corp knowingly entered into an agreement, that this record clearly, clearly does not allow for such a finding by any reasonable jury.

Briefly, with respect to the advisory jury point. It is true that Your Honor indicated at the start of these proceedings that that was a possibility, depending upon how you decided to charge the jury and the verdict form that would be used at the end. I've looked very carefully at the charge that you've given to us and a verdict form and it's a standard [1542]charge to a standard jury. There's

no indication here of any particular special mechanism for an advisory jury so I'm taking it that Your Honor is not intending to use an advisory jury.

If that were contemplated, which I submit at this late date is a difficult point to address, Your Honor's discussed this in the past. There are two case, both 30 years old, one from the Second Circuit which is the Mara case. There's one from the Eastern District, which is the Chance case. The Mara case clearly said no advisory jury under situations like this. Your Honor's suggested that the Chance case said differently, but if you look at the Chance case, it allowed an advisory jury on a predicatory issue of choice of law, but said that the jury in Chance would still determine the ultimate facts on the merits, and that's what we're talking about here.

And actually, I think I go back to what my evidence professor Weinstein said in his decision. Judge Weinstein, in the *City of New York v Barrett* case which is a 2004 case here in the Eastern District, 317 F. Supp. 193, and he said – and it's pretty simple -- he said when in doubt, send it to the jury and that's exactly what we've got right here.

And so, I don't think that's what we're looking at, but that's defendant's position on the question, Your Honor.

THE COURT: Okay.

[1543]All right, well, let me start at the bottom, first.

I tend to agree that this is not going to be an advisory

jury. I was concerned at the beginning of the case that it might not be possible to avoid having the jury determine some of the facts that I determined in the 44.1 inquiry. However, that didn't happen. It's entirely possible. There are a couple of slight overlaps that are raised, I think, in plaintiff's motion in limine that was filed early this morning, but I have no doubt that we can straighten that out for the jury.

So, I will not be regarding the jury's verdict as advisory. It will be a binding verdict on the questions that I am going to put to them and the charge that I'm going to give to them. So, that is not an issue.

Let me talk first about Tiger and Hualong.

MR. ISAACSON: I'm sorry, to interrupt, Your Honor.

THE COURT: Yes.

MR. ISAACSON: Just to be, for the record, may we, we just want to reserve our position that we would be entitled to judgment as to matter of law with regard to compulsion with regards to conspiracy with respect to Hebei.

THE COURT: Understood. Your position is reserved.

If there was some kind of presumption that these contracts have an arbitration clause, then I could understand defendant's point. But as we know, there is no such [1544]presumption possible. We don't know that there is an arbitration clause. We don't know that there isn't. I think when the plaintiff, which clearly has the burden of proof on all elements of its damage claim, puts the contracts of sale into -- it quantifies them for purposes of claiming damages on them, it has met its burden of going forward on that issue.

It then becomes incumbent on the defendants, it seems to me, to come back and say wait a minute, that's wrong, those contracts should not be included. They are contracts. They are prima facie evidence of sales and unless there's some reason the defendants want to offer to show that they ought to be excluded, then I think they should not be. So, I am rejecting that point.

On the Act of State doctrine I will adhere to all of the statements I made on my prior ruling holding it inapplicable. I think this is clearly not a case where anyone will be judging whether the Chinese government has acted in an illegal fashion. Plaintiffs can only prevail here if the jury determines that the Chinese government did not act. Period. So, for that reason and the others that I've stated, I think the Act of State doctrine is, the motion directed to that, must be denied.

On the compulsion defense, I think we clearly have factual issues. I see them now much better than I did at the beginning of the case and even beyond that, more

clearly than [1545]I did when I was writing the summary judgment decision. We essentially start with minutes of meetings which show an absence of compulsion; at least, a jury could reasonably find that they show an absence of compulsion.

We then have witness testimony that says you can't go strictly by the literal language of the minutes because that's not what was going on. That's an issue for the jury to determine who is right on that.

This notion that the minutes don't mean what they say and the presentation of a unanimous agreement is not necessarily indicative of the true state of affairs is not implausible to me. It seems to me there are societies where things are made to look like everyone is in perfect agreement when, in fact, sometimes people have no choice. But that's an argument for the jury.

I didn't hear any expert testimony from a sociologist or a political scientist explaining how this is a basic rubric of Chinese society and, while I may have some individual views about that, that obviously has no role in this case. So, I think we plainly have a factual issue on compulsion and I'm very glad that we set up the trial this way because I think it's really been teed-up excellently by both sides and the jury will have the ability to determine who has the more credible position on that.

The closest question is on Group Corp. I am going [1546]to adhere to my decision on summary judgment. I think Mr. Isaacson is right; that there is a little more

suggestion than there was then that Group Corp was involved in this sufficiently to put liability. I will tell you candidly, I'm not entirely comfortable that there is enough there to sustain a jury verdict.

It is certainly not uncommon for a parent corporation or investors in a corporation to monitor the financial activity of the corporation and it is also not uncommon for there to be some shared facilities.

You know, it is not the fact of this case, although it is common in many other cases, that a corporate family will use a cash-sweep method where all cash and all subsidiaries is swept up to the parent and then, doled out as operating funds to the subsidiaries; even in that situation the parent is not generally deemed to be acting for the subsidiary, but I do think that it is a close enough issue where the exercise of discretion suggests that I put it to the jury and let the jury decide on it and then address it later, if necessary.

(Continued on following page.)

[1547]THE COURT: (Continuing) I am therefore going to reserve decision, which I think I can still do under Rule 50, on that point. If I can't do it, then I am denying the motion to dismiss at this stage pending the jury's verdict.

All right. That's my ruling on the Rule 50 motions. Let's now start the charging conference.

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APPENDIX I — SPECIAL VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MARCH 14, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738 (BMC) (JO)
05-CV-0453

IN RE VITAMIN C ANTITRUST LITIGATION

This document relates to:

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Plaintiffs,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Defendants.

SPECIAL VERDICT FORM

We, the jury, unanimously agree to the answers to the following questions and return them under the instructions of this Court as our verdict in this case:

Question 1: Did plaintiffs prove, by a preponderance of the evidence, that the following defendants knowingly

entered into an agreement or conspiracy with the purpose of or predictable effect of fixing the price or limiting the supply of Vitamin C?

A. Hebei Welcome Pharmaceutical Co., Ltd.

X	
YES	NO

B. North China Pharmaceutical Group Corp.

X	
YES	NO

If your answer to any part of Question 1 is "Yes," please answer Question 2. If your answers to both parts of Question 1 are "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 2A: Did plaintiffs prove, by a preponderance of the evidence, that the plaintiff class was in fact injured as a result of defendants' alleged violation of the antitrust laws?

X	
YES	NO

Question 2B: Did plaintiffs prove, by a preponderance of the evidence, that defendants' alleged illegal conduct played a substantial part in bringing about or causing their injury, and that the injury was a direct and proximate result of the unlawful activity?

YES	NO
X	

Question 2C: Did plaintiffs prove, by a preponderance of the evidence, that defendants' alleged illegal conduct resulted in plaintiffs and the class members paying higher prices for their vitamin C purchases than they would have paid had the agreements not existed?

YES	NO
X	

If your answer to all parts of Question 2 is "Yes," please answer Question 3. If your answers to any part of Question 2 is "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 3: Did defendants prove, by a preponderance of the evidence, that defendants were actually compelled by the Government of China to enter into agreements fixing the price or limiting the supply of vitamin C exported from China from the period of December 1, 2001 to June 30, 2006 and that defendants faced the prospect of penalties or sanctions for not complying with the directives or commands of the Chinese government in this regard?

YES	NO
	X

If your answer to Question 3 is "No," please answer Question 4. If your answer to Question 3 is "Yes," please go to the end of the verdict form, and sign and date it where indicated.

Appendix I

Question 4: Did plaintiffs prove, by a preponderance of the evidence, that they suffered damages in an amount that is ascertainable and not speculative?

X	
YES	NO

If your answer to Question 4 is "Yes," please answer Question 5. If your answer to Question 4 is "No," please go to the end of the verdict form, and sign and date it where indicated.

Question 5: What amount of damages have plaintiffs proved, by a preponderance of the evidence, that the plaintiff class suffered as a result of defendants' conduct?

$54.1 m
(Please fill in total dollar amount)

The jury foreperson must sign and date this form.

Signed: /s/ Date: 3/14/13
Foreperson

APPENDIX J — PETITIONERS' PETITION FOR REHEARING OR REHEARING *EN BANC*, DATED OCTOBER 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

13-4791-cv

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (BROOKLYN)

PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR REHEARING *EN BANC* ON BEHALF OF PLAINTIFFS-APPELLEES

ANIMAL SCIENCE PRODUCTS, INC.,
THE RANIS COMPANY, INC.,

Plaintiffs-Appellees,

– v. –

HEBEI WELCOME PHARMACEUTICAL CO. LTD., NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,

Defendants-Appellants.

Appendix J

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[Tables intentionally omitted]

Appendix J

RULE 35(B) STATEMENT

This case involves questions of exceptional importance under the U.S. antitrust laws and the doctrine of international comity: whether a panel of this Court correctly vacated a jury verdict after giving conclusive deference to the Chinese Ministry of Commerce's ("Ministry") Amicus Brief, which contended that Chinese law compelled the conduct found by the jury to violate the Sherman Act. Two district judges concluded that the Ministry's assertions were not supported by Chinese law and both judges and the jury found that the assertions were contrary to the factual record of whether compulsion actually took place.

As detailed below, the panel decision conflicts with (1) Supreme Court precedent concerning the doctrine of foreign government compulsion; (2) circuit precedent concerning deference to statements of foreign governments; (3) precedent concerning the review of a pretrial dispositive motion where the trial has actually taken place; and (4) Fed. R. Civ. P. 44.1 concerning the evidence that should be considered in construing foreign law. The decision has far-reaching consequences, and will undermine enforcement of the U.S. antitrust laws by permitting foreign governments to submit post hoc excuses to shield their country's industries from liability.

BACKGROUND

The panel decision ("Op." attached as "Exhibit A") vacates a jury verdict and judgment under the U.S.

antitrust laws after concluding that the doctrine of international comity required conclusive deference to an Amicus Brief from the Ministry stating that the violations of U.S. antitrust law in this case were compelled by the Chinese government.

The panel agreed that there "is competing authority on the level of deference owed by U.S. courts to a foreign government's official statement regarding its own laws and regulations." Op. 23-25 (citing competing decisions of the Third, Fifth, and Seventh Circuits). The panel concluded that an official statement by a foreign government should be conclusive: "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer[1] regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Op. 30. The panel acknowledges that although "on their face the terms 'industry self-discipline,' 'coordination,' and 'voluntary restraint' may suggest that the Defendants were not required to agree to 'industry-wide negotiated' prices," but "defer[s] to the Ministry's reasonable explanation that these are terms of art within Chinese law connoting the government's expectation that private actors actively self-regulate...." Op. 33. As a result, "because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin

1. The position of the Chinese government was submitted to the district court in the form of an Amicus Brief and not a "sworn evidentiary proffer."

C sold abroad" international comity required the district court to abstain from exercising jurisdiction. Op. 4.

The decision states that because "we vacate the judgment and reverse the district court's denial of Defendants' motion to dismiss, we do not address the subsequent stages of this litigation." Op. 3 n.2, Although a trial took place, the panel states that the facts are those in the Second Amended Complaint and the district court's decision denying the motion to dismiss. Op. 5 n. 3.

The panel decision does not reach Appellants' other defenses, including the defense of foreign sovereign compulsion.

REASONS FOR GRANTING REHEARING

Based on the evidence in discovery and then at trial, the district court concluded that Appellees' antitrust damages stemmed from Appellants' *voluntary* actions, rather than any sovereign acts of the Chinese government. SPA-36, 65-68, 71-77. The panel's decision not to consider the evidence endangers enforcement of the U.S. antitrust laws against foreign cartels. By mandating that courts award conclusive deference to the statements of foreign governments and on appeal disregard any evidence apart from those statements on their face, the panel eliminated the need for analysis of the factors relevant to a foreign sovereign compulsion defense. When a government declares that it compelled conduct, no further analysis is permitted, including evidence that there was no compulsion.

For this result, the panel relies on the doctrine of international comity, which is based on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). It "is neither a matter of absolute obligation... nor of mere courtesy and good will." *Id.* This Circuit has described the doctrine as "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith." *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (internal quotations omitted). "[T]he doctrine is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *Id.* at 423 (internal quotations omitted). To trigger the discretionary doctrine, the Supreme Court has held that a "true conflict" must exist between U.S. and foreign law such that compliance with the laws of both countries is impossible. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).

I. The Panel's Interpretation of International Comity Creates a Conflict with Supreme Court and Other Case Law on Foreign Sovereign Compulsion.

The panel erred in holding that the district court should have awarded conclusive deference to the Ministry's statement that Chinese law *compelled* the Defendants to act in violation of U.S. antitrust laws, overriding existing case law stating the requirements of a defense of foreign sovereign compulsion. The panel also

found that the district court committed error using the same analysis of foreign sovereign compulsion found in the Antitrust Guidelines promulgated by the U.S. Department of Justice. *Compare* Op. 36; see SJ Order at 29, 35.

The panel found three "problems" with the district court's analysis of foreign sovereign compulsion using the "amorphous" doctrine of international comity. The first analytical problem that the panel decision points to is the district court's consideration of "whether Defendants petitioned the Chinese Government to approve and sanction such conduct." Op. 36. The panel next took issue with the district court's "reli[ance] on evidence that China's price-fixing laws were not enforced." Op. 36. A third problem the panel found was that the district court "determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict." Op. 36.

Each of the purported "problems" identified by the panel are express requirements for the defense of foreign sovereign compulsion in an antitrust case. The panel's conclusion that it was irrelevant whether the Chinese government was sanctioning private conduct directly conflicts with Supreme Court decisions on foreign sovereign compulsion. Those decisions hold that a defense of foreign sovereign compulsion to an antitrust claim does not extend to voluntary conduct that is sanctioned or facilitated by a foreign government. A-1909-10 at 1760:3-1761:13; *accord Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275 (1927).

The panel's analysis on the relevance of actual enforcement of Chinese law conflicts with the requirement that the defense of foreign government compulsion against an antitrust claim requires proof of enforcement with sanctions and penalties. U.S. DOJ & FTC ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.32 (1995) ("INTERNATIONAL GUIDELINES") ("the foreign government must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441 (1987).

Likewise, the panel's holding that it was error to consider whether Appellants' specific conduct was compelled, Op. 3, contradicts the principle that private conduct violating the U.S. antitrust laws may not go beyond what the foreign government compels. INTERNATIONAL GUIDELINES § 3.32 ("a direct conflict may arise when the facts demonstrate that the foreign sovereign has compelled the very conduct that the U.S. antitrust law prohibits").

The panel decision will have far-reaching consequences. In holding that whether Appellants charged prices in excess of those mandated "does not weigh heavily" in the court's analysis of compulsion, the decision would immunize all price-fixing by foreign companies above a compelled minimum price. Op. 39. The literal result will mean foreign government compulsion of even a penny of price fixing will permit unlimited voluntary price fixing by foreign companies.

The facts here illustrate the dangers for antitrust enforcement. The district court correctly found that, even if Appellants were required to "coordinate" on a minimum price, the only minimum price was $3.35 and Appellants exceeded the scope of any compulsion by agreeing to fix prices well above $3.35 and by agreeing to restrict production. SPA-55-56. The evidence showed: "Yes, when [the price is] over [$3.35], they [the Chamber] don't care." A-1709-10 at 362:25-363:7. Mr. Qiao admitted that there was no direct authorization for the Chamber to use its verification and chop procedures to control export volumes. A-1799-1800 at 1032:24-1033:22. The chop form on which Mr. Qiao relied did not even have a field to report volume agreements. A-1934-38. The illegal conduct found by the jury thus was based on conduct that Chinese law did not actually compel.

II. The Panel Decision Conflicts with Decisions of this Circuit Concerning the Appeal of an Earlier Dispositive Motion Following Trial and the Conclusive Deference Afforded the Ministry's Amicus Brief.

A. The Panel's Decision Granting the Chinese Government Amicus Brief Conclusive Deference Conflicts with Circuit Law.

The panel's decision that the Ministry's statements in the Amicus Brief are conclusive on the issue of whether the companies' conduct was compelled – no matter what the evidence actually shows – conflicts with other decisions of this circuit. The district court followed two decisions

of this circuit that the statement of a foreign government is entitled to substantial deference, but is not conclusive. *Duran v. Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008) ("even if [Chilean Authority Statement] is authoritative, the district court was not bound to follow it"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("a foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference").

The panel's decision to grant conclusive deference to statements in the Ministry's Amicus Brief is particularly startling because the Chinese government has flatly taken the opposite position in statements to the World Trade Organization. G/C/W/438 (20 November 2002), at 3 (it gave up "export administration . . . of vitamin C" in 2002); Brief for Plaintiffs-Appellees at 41 (2d Cir. Aug. 11, 2014), ECF No. 174. China has also told the WTO that vitamin C was not one of the materials subject to minimum prices. *Id; see also* A-468-69, A-519.

The panel distinguishes *Villegas Duran* because the position of the Chilean Government was presented by a sworn affidavit, rather than by appearing in the case as Amicus. Op. 28. This is form over substance, particularly given that the panel's decision states that position of a foreign government should be stated in a "sworn evidentiary proffer," which happened in *Villegas Duran*, but not here.

The panel states that *Villegas Duran* was vacated by the Supreme Court in light of *Abbott v. Abbott*, 560

U.S. 1 (2010). In *Abbott*, the Supreme Court and Second Circuit did *not* accept a foreign official's interpretation as "conclusive" – they agreed only after conducting their own analyses – just as the district court did here. *Id.* at 10-14; *Duran v. Beaumont*, 622 F.3d 97, 98-99 (2d Cir. 2010).

With respect to *Karahas Bodas*, the panel states that the court there ultimately adopted the Republic of Indonesia's interpretation, but that court did so, not by applying conclusive deference, but rather engaging in its own review.

The panel decision's exclusive reliance on the Amicus Brief of the Ministry also flies in the face of Fed. R. Civ. P. 44.1. Rule 44.1 provides that a federal court shall determine issues of foreign law as "question[s] of law" and authorizes the court to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." "[F]oreign law is to be determined by the court, in light of both evidence admitted and the court's own research and interpretation." *Ackermann v. Levine*, 788 F.2d 830, 838 n.7 (2d Cir. 1986). Two district judges followed this rule and carefully considered all relevant sources in interpreting foreign law.

B. The Panel Decision Conflicts with Circuit Law on Review of a Pretrial Denial of a Dispositive Motion Following a Trial.

The panel's decision based its review on the record at the stage of the motion to dismiss and for that reason

conflicts with rulings of this circuit and the Supreme Court. Ordinarily a district court's denial of a motion for summary judgment, and by implication a motion to dismiss, is not reviewable following a trial and the record on appeal must be the record at trial. *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011); *Schaefer v. State Ins. Fund*, 207 F.3d 139, 142 (2d Cir. 2000).[2] "[E]ight circuit courts had recently adopted the rule that the denial of summary judgment is not reviewable on appeal after a full trial." *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 421 (4th Cir. 2005) (circuit court citations omitted).

In *Ortiz*, the Supreme Court did not permit petitioners to appeal an order denying summary judgment after a full trial on the merits because the questions raised on appeal did not present "neat abstract issues of law." 562 U.S. at 191 (internal quotations omitted).[3] In the context of the

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2. A motion to dismiss based on international comity that does not present a controlling question of law, but rather raises both factual and legal questions, is therefore within the discretion of the district court. Op. 14; *see Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998) (record insufficient to demonstrate conflict of laws for comity analysis); *Drexel Burnham Lambert Group v. Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) ("when there are disputed issues of material fact, a motion to dismiss an action on the basis of international comity should not be granted without an evidentiary hearing"); *cf. Petrol Shipping Corp. v. Kingdom of Greece*, 332 F.2d 370 (2d Cir. 1964) (*en banc*) (per curiam) (remanding to decide issue of sovereign immunity only after full evidentiary hearing).

3. *Accord Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 201 n.2 (2d Cir. 2014); *Gamco Investors, Inc. v. Vivendi Universal,*

defense of qualified immunity, the Supreme Court held in *Ortiz* that, following a denial of summary judgment, the defense must be evaluated in light of the evidence at trial. *Id.* at 184. Here the issue of compulsion is not a pure issue of law as it depends upon a determination of foreign law as applied to the facts in this case.

In this case, the panel's decision rendered irrelevant the evidence at trial that there was no actual compulsion and only voluntary conduct, no matter how strong or conclusive that evidence. This decision to cut off consideration of the record at the motion to dismiss stage was critical to the outcome of the panel decision. The opinion expressly states that "if the Chinese Government had not appeared in th[e] litigation," the Court would find no error or abuse of discretion with the district court's "treatment of the evidence before it in analyzing what Chinese law required." Op. 35 n.10.

Even if it were appropriate to treat this as an appeal of a motion to dismiss, which it is not, the panel decision conflicts with circuit law because it fails to take the allegations of the Complaint as true. The district court

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S.A., No. 13-1194, 2016 U.S. App. LEXIS 17520 (2d Cir. Sept. 27, 2016). Several circuits have expressly held that the denial of a motion to dismiss under 12(b)(6) is not appealable after a trial, just as the denial of a motion for summary judgment is not appealable after trial. *ClearOne Commc'ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011) (sufficiency of allegations of complaint is irrelevant if plaintiff has prevailed at trial); *Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("After a trial on the merits, the sufficiency of the allegations in the complaint is irrelevant").

followed traditional standards and thus denied the motion to dismiss. SPA-1-31.

C. The Record Not Addressed by the Panel Overwhelming Shows Voluntary Conduct in Violation of the Antitrust Laws.

The evidence of voluntary corporate price fixing in the record here was overwhelming. As the district court held, plaintiffs could "only prevail here if the jury determines that the Chinese government did not act. Period." A-1867, lines 16-19.

As noted by the panel, the Amicus Brief stated that the alleged government compulsion here was implemented through the China Chamber of Commerce of Medicine & Health Products and its Vitamin C Subcommittee. Op. 9. The head of the Vitamin C Subcommittee, Qiao Haili, testified at trial. The jury heard Mr. Qiao's deposition testimony in which he said it was "accurate" that "export prices are fixed by enterprises without government intervention." A-1811, lines 1-11; A-1812, lines 6-11. Mr. Qiao admitted that "on the whole, the government did not involve itself in price fixing." A-1811, lines 2-15. A witness from one of the co-conspirators was asked about price understandings among the manufacturers and he confirmed, "Nobody's going to force them." A-1707-08 at 360:25-361:3.

Documents showed that Appellants *voluntarily* formed their cartel in 2001 in response to price wars and the anticipated abolishment of government export controls.

A-3879-85; A-2012 ("in order to turn the cruel situation of VC market, the 4 main domestic companies reached the common understanding of production limitation and price retention"); A-2080-82 ("hand voting"); A-2036 ("the industry exercised self-restraint").[4] Mr. Qiao admitted that from 2002 forward, no price limitations or agreements on export quantities went forward without the support of the majority of the manufacturers. A-1803, lines 11-15; A-1804, lines 13-14; A-3994, lines 12-16, 21. "If nobody agrees, then we could not have a stoppage. No agreement, no stoppage." A-1802 03 at 1037:21-1038:3. He also admitted it was "perfectly acceptable" for the companies to decide to have *no minimum prices.* A-1821, lines 3-11; A-1822, lines 20-24.

The evidence also showed that, rather than compulsion, the parties could withdraw from cartel agreements whenever they desired. A-1985 ("tore up the agreement"); A-2049 ("reneging"); A-2250 ("over threw the June production suspension agreement"); A-2257 ("unilaterally

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4. *See also* A-2100 (manufacturers "agreed to limit production during the first half of 2004"); A-1974 ("Concerned with price drop in the market, all participating manufacturers agreed to increase stock in the Shanghai warehouse"); A-2105 ("we had an agreement among all the producers, and the production shutdown in June is [] part of this agreement"); A-2161 ("The participants agreed on two measures: first, to raise the price quote unanimously . . . and second, each manufacturer will halt production for 40 days"); A-1967-68 ("We all agreed to set the floor price at 9.20 USD/kg"); A-1979 ("reached an agreement, in which the 6 domestic VC manufacturers will arrange to suspend production"); A-1944 ("All the agreements reached (and signed by representatives of all the companies)").

pulled out"); A-2001 ("damage to the agreement caused by Weisheng"); A-1705-06 at 350:16-351:10; SPA-101-02; A-1968 ("every manufacturer quoted prices lower than the floor price").

Not a single document created before the filing of this lawsuit reflected any instruction that compelled vitamin C prices. A-1700-01 at 329:4-330:2; A-1717-18 at 450:24-451:1. Rather, documents showed that the companies manufactured the government compulsion defense after the lawsuit was filed. A-2208 ("Even if we lost the case, government would take the foremost part of responsibility. After all, we need to do many things in a more hidden and smart way").

The evidence at trial further demonstrated that in July 2003, Mr. Qiao wrote a memo about vitamin C to the Ministry admitting that the compulsion defense in this case was never true. He wrote that "the legal standing of chambers of commerce is still not clear," his Chamber "need[s] support from relevant government departments," and the Chamber rules "become formality and only 'honest fellows will follow.'" A-2174. Mr. Qiao's testimony regarding this memo was shown to be false – he testified that the memo concerned a penicillin (rather than vitamin C) agreement, but on cross-examination was forced to admit that he had lied because the penicillin agreement took place after his July 2003 memo was written. A-1828-32 at 1152:6-1154:4, 1227:13-1228:3; A-1796-98 at 1028:20-1030:5, A-3991-92 at 235:16-19, 21; 232:5-235:9; A-1835, lines 4-18.

In the face of this evidence, the panel does not point to any Chinese law or regulation requiring fixing of prices or restrictions on supply, referring instead to what "the Ministry represented" in the Amicus Brief. Op. 10-11. The panel points to the Amicus Brief's reliance on a 2002 Notice, but that Notice only stated that the relevant chambers would provide information on "industry-wide negotiated" prices to Customs, and provided no guidance or requirement as to those "industry-wide negotiated" prices. SPA-302 at Art. 3. No one was required to agree on "industry-wide negotiated" prices. The Chamber filed a list of export prices "agreed by the industry" with Customs that left the price for vitamin C blank. A-1934-35.

CONCLUSION

Plaintiff - Appellees respectfully request that the petition for rehearing or rehearing *en banc* be granted.

Dated: October 4, 2016

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Appendix J

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APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 13-4791

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of November, two thousand sixteen.

IN RE: VITAMIN C ANTITRUST LITIGATION

****

ANIMAL SCIENCE PRODUCTS, INC.,
THE RANIS COMPANY, INC.,

Plaintiffs-Appellees,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD.,
NORTH CHINA PHARMACEUTICAL GROUP
CORPORATION,

Defendants-Appellants.

Appendix K

ORDER

Appellees Animal Science Products Inc. and The Ranis Company, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ _____

RECORD AND BRIEFS

No. 16-1220

FILED
JUN 5 2017
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal appellate court may review a federal district court's decision to exercise jurisdiction over a case under Federal Rule of Civil Procedure 12(b)(1), consistent with unanimous federal practice since the earliest days of the federal judiciary.

2. Whether this Court should review the Second Circuit's narrow decision granting deference to the formal statement of a foreign government on the meaning and operation of its regulatory regime where that conclusion is wholly consistent with this Court's decision in *United States v. Pink*, 315 U.S. 203 (1942), and does not conflict with any decision of any other circuit.

3. Whether this Court should overturn decades of precedent and eliminate international comity abstention in the antitrust class-action context—a question Petitioners did not raise below.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

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INTRODUCTION

Seventy-five years ago in *United States v. Pink*, 315 U.S. 203 (1942), this Court affirmed a fundamental principle of respect for foreign governments' explanations of the meaning of their own laws and regulations before U.S. courts. In the proceedings in this case, the district court failed to adhere to *Pink* and rejected the formal representations of a foreign government as to the meaning of its own laws. The district court essentially permitted private class-action attorneys to use the federal courts to contest a foreign sovereign's regulatory regime.

The U.S. Court of Appeals for the Second Circuit properly disapproved of the district court's approach, holding that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 25a. The Second Circuit's unanimous decision comports with this Court's precedent, cogently harmonizes appellate case law, creates no division of authority, and provides clear guidance to the lower courts hearing cases that implicate comity concerns. It thus raises no issue meriting this Court's review.

This case arises against the backdrop of China's attempt to modernize its economy in an orderly way. The government of the People's Republic of China has closely regulated a number of key industries for many years to ensure a smooth transition from a centralized command economy to a socialist market economy. As part of this transition,

the relevant government Ministry [1] established a regulatory framework that directed Chinese vitamin C producers to reach agreement on minimum export prices and to observe export volume restrictions. Years later, Petitioners filed a private antitrust class action in the United States alleging that Respondents and other Chinese vitamin C manufacturers had conspired to fix prices. The Ministry made an unprecedented appearance before the district court in support of Respondents' motion to dismiss to explain that Chinese law in fact required the conduct at the root of Petitioners' antitrust complaint: an agreement to coordinate pricing.

The district court did not afford the Ministry's interpretation of its own laws the respect required by this Court—the same respect that the U.S. Government would expect when explaining U.S. law to a foreign court. Discounting the Ministry's description of a regime created through its own exercise of sovereign authority to regulate the Chinese economy, the district court instead relied on its own assessment of China's complex, unfamiliar regulatory system. The district court adopted a view of Chinese law directly contrary to the Ministry's and allowed the case to proceed to trial—without allowing the jury the benefit of even considering the Ministry's explanation. The trial proceedings resulted in a judgment requiring Respondents to pay over $150 million for conduct that the Chinese government clearly stated was required by Chinese law.

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[1] Both the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and Ministry of Commerce ("MOFCOM"), MOFTEC's successor entity, issued regulations relevant to this case. For simplicity, both are herein referred to as "the Ministry."

Unsurprisingly, this intrusion of U.S. class-action lawyers into China's domestic economic regulation strained relations between the two countries: while Respondents' appeal was pending below, the Chinese government relayed its objection to the U.S. Department of State in an official diplomatic statement, and the Ministry reaffirmed its interpretation of its own regulations. The Second Circuit properly corrected the district court's error by giving appropriate deference to the Ministry's explanation and concluding that international comity required that the case be dismissed.

No issue identified by Petitioners merits this Court's review. *First*, in challenging the Second Circuit's review of Respondents' motion to dismiss, Petitioners disregard the fact that international comity abstention represents a threshold determination for resolution under Federal Rule of Civil Procedure 12(b)(1), not an issue whose resolution depends on further developments at trial. This Court has held since its earliest cases that vacating a trial judgment and remanding with instructions to dismiss is the appropriate way to resolve the district court's improper exercise of jurisdiction. *See Capron v. Van Noorden*, 6 U.S. 126, 127 (1804). The Second Circuit did not err in following that approach, and no other court of appeals has deviated from it.

Second, the decision below comports with this Court's decades-old guidance in *Pink* and the decisions of other lower courts that have considered explanations of foreign law offered to a U.S. court by a foreign sovereign. The Second Circuit properly relied on the Ministry's construction of its own regulatory regime to hold that a true conflict existed between Chinese and U.S. law that, together with a

number of other factors balancing competing U.S. and Chinese interests, required the district court to abstain from exercising jurisdiction on international comity grounds. The court's decision is narrow. The high level of deference to a foreign government's view of its own laws is required only when the foreign government directly participates in the case to articulate its position in a sworn evidentiary proffer and where that position is reasonable. Nothing in the Second Circuit's reasoning on this point merits review in this Court.

Third, lower courts have consistently recognized that, in rare circumstances like this, federal courts should abstain from exercising jurisdiction on international comity grounds. Petitioners never argued (or even suggested) below that the international comity doctrine no longer applies to antitrust actions, and no holding from this Court or any court of appeals supports such a rule. The Court should therefore reject Petitioners' request that it entertain academic speculation that Petitioners themselves never even advanced below. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is a court of final review and not first view.") (citation omitted).

Petitioners fail to identify any issue warranting this Court's review. The petition should be denied.

STATEMENT OF THE CASE

1. Petitioners, plaintiffs and appellees below, are Animal Science Products, Inc. and The Ranis Company, Inc., class representatives for (1) a class of direct and indirect purchasers of vitamin C seeking injunctive relief and (2) a class of direct purchasers of vitamin C seeking damages for alleged overcharges.

Respondents, defendants and appellants below, are Hebei Welcome Pharmaceutical Co. Ltd. ("Welcome"), a Chinese vitamin C manufacturer, and North China Pharmaceutical Group Corporation ("NCPG"), a holding company that owns a minority share of North China Pharmaceutical Co. Ltd., which in turn holds a majority share of Welcome. NCPG disputes the U.S. courts' personal jurisdiction over it in this case.

2. Since 1989, the Ministry has regulated foreign trade in medicinal products by Chinese companies through the Chamber of Commerce of Medicines and Health Products Importers & Exporters (the "Chamber"). The Chamber is established and overseen by the Ministry and "must implement . . . administrative rules and regulations relating to foreign trade and economy" as part of its "coordination and industry regulation" functions. Dkt. 167-3 at 16, Case No. 13-4791 (2d Cir. July 28, 2014). Unlike similarly named organizations in the United States, the Chamber is an instrument of the government. The Ministry exercises plenary authority over the Chamber, including by selecting or approving senior Chamber officials (often drawn from Ministry staff), approving the Chamber budget, and requiring the Chamber to submit annual plans and records of important meetings and activities for review.

Chinese vitamin C manufacturers were subject to two regulatory regimes established and supervised by the Ministry and the Chamber during the relevant time period of this case. In 1997, the Ministry issued the Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration (Nov. 27, 1997). The 1997 Notice directed the Chamber to

establish a Vitamin C Sub-Committee responsible for "coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produc[t] in the world market and promote the healthy development of Vitamin C export of China." Dkt. 154-2 at 86, Case No. 13-4791 (2d Cir. July 28, 2014).

In 2002 a new Ministry notice superseded the 1997 Notice and established a regulatory system known as "price verification and chop" ("PVC"). The 2002 Notice was issued to avoid antidumping complaints from foreign governments and facilitate China's entry into the World Trade Organization, while maintaining the Ministry's efforts to direct an orderly transition to a socialist market economy. Under the PVC system, the General Administration of Customs would permit exports of vitamin C only if the relevant contract had received approval from the Chamber in the form of a "chop." The Chamber's chop signified that the contract complied with Ministry and Chamber requirements, including by setting a price at or above the minimum price set by coordination through the Chamber.

The Ministry explained below that vitamin C exporters were required under both the 1997 and 2002 regimes to coordinate on prices and export volumes. Contrary to Petitioners' claim, Pet. 11, the Ministry's brief established that it was authorized to interpret the relevant Chinese regulations. The Ministry explained that it is the equivalent of a cabinet-level department in the U.S. Government system and that it "drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system." Dkt. 69 at 1, Case No. 06-md-01738 (E.D.N.Y. Sept.

22, 2006). The Ministry promulgated the notices establishing the regulatory regimes at issue in this case and directed and oversaw the Chamber's efforts to implement the requirements of those regimes.

The Ministry explained below that, under the 1997 Notice, it directly enforced price and export quantity coordination through an export licensing system. In 2002, to implement the new regulatory system for vitamin C, the Sub-Committee enacted a revised charter. The Sub-Committee remained obligated to "coordinate[] and guide[] vitamin C import and export activities, promote[] self-discipline in the industry, maintain[] the regular order of vitamin C import and export operations, and protect[] the interests of the state, the industry and [its] members." Dkt. 154-2 at 89, Case No. 13-4791 (2d Cir. July 28, 2014). The Chamber's responsibilities continued to be to "coordinate and guide the import and export of medicines and health products[,] . . . maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade[, and] safeguard lawful rights and interests of member organizations." *Id.* at 76.

3. Petitioners filed a class-action complaint against Respondents and other Chinese vitamin C manufacturers in the Eastern District of New York on January 26, 2005, alleging a conspiracy to fix prices and output volumes of vitamin C in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents argued that Chinese law compelled the conduct at issue and moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the basis of the foreign sovereign compulsion doctrine, the act of state doctrine, and/or international comity abstention. The Ministry appeared as *amicus curiae*—the first time any entity

of the Chinese government had ever done so before a U.S. court—and filed a brief supporting the motion. Pet. App. 6a n5. The Ministry stated that regulations promulgated under its authority required Chinese vitamin C manufacturers to agree on price and output levels to aid an orderly transition from a centralized command economy to a socialist market economy. Judge David G. Trager denied Respondents' motion, concluding that further factual development was required to evaluate the "ambiguous" record as to whether Respondents' conduct was in fact voluntary. 584 F. Supp. 2d 546, 557-59 (E.D.N.Y. 2008).

On summary judgment, Respondents reasserted the same three defenses. 810 F. Supp. 2d 522, 525-26 (E.D.N.Y. 2011). In addition to the Ministry's statements, Respondents offered expert reports by Professor Shen Sibao, Dean and Professor of Law at the University of International Business & Economics in Beijing and Dean of the Shanghai University Law School, and Professor James B. Speta, Professor of Law at Northwestern University. Professors Sibao and Speta explained that vitamin C was a regulated industry in China and that Ministry regulations required coordination on price. Petitioners did not offer a Chinese law expert of their own. 810 F. Supp. 2d at 526 n.5.

Judge Brian M. Cogan, assigned to the case after Judge Trager's passing, recognized that the Ministry was the "highest authority in China authorized to regulate foreign trade." *Id.* at 525. Nonetheless, Judge Cogan deemed the Ministry's statement "particularly undeserving of deference," *id.* at 551, and suggested that it was a "post-hoc attempt to shield defendants' conduct," *id.* at 552. The district court thus refused to defer to the Ministry's explanation, treating discrepancies between the

Ministry's statements and Petitioners' (mis)reading of Ministry and Chamber regulations as an invitation to "parse out [Respondents'] precise legal role within China's complex vitamin C market regulatory framework." Pet. App. 29a-30a. After conducting his own analysis of Chinese law, Judge Cogan concluded, contrary to the Ministry's explanation of its own regulations, that Respondents' conduct was not compelled. *Id.* at 553-67. The court denied Respondents' summary judgment motion on that basis. *Id.* at 525.

Trial was held from February 25, 2013 to March 14, 2013. Judge Cogan excluded much of the evidence supporting Respondents' compulsion defense at trial—including the Ministry's highly relevant and authoritative explanations of Chinese law—in an unpublished written order and several bench orders. 2012 WL 4511308 (E.D.N.Y. Oct. 1, 2012). The jury was ultimately asked only to decide whether there was "compulsion in fact," but, even on that limited question, the exclusion of the most relevant evidence hampered Respondents severely in their ability to present their defenses to the jury. The jury returned a verdict against Respondents, awarding pre-trebled damages of $54.1 million. Respondents moved orally for judgment as a matter of law under Rule 50(a) at the conclusion of trial and filed a written motion under Rule 50(b) after the jury verdict was returned. Respondents' Rule 50(b) motion identified the same three grounds advanced at the motion to dismiss and summary judgment stages. Judge Cogan again denied Respondents' motions. 2013 WL 6191945 (E.D.N.Y. Nov. 26, 2013).

4. Respondents filed a notice of appeal designating all prior judgments, orders, and opinions on December 23, 2013. As relevant to the decision

below, Respondents sought review of "[w]hether the district court erred in failing to dismiss the case on international comity and/or act of state grounds." Dkt. 175 at 3, Case No. 13-4791 (2d Cir. Aug. 11, 2014). While the appeal was pending, the Chinese government filed an official diplomatic statement with the U.S. Department of State, noting that the case was of "great importance" to China and again emphasizing that Chinese law compelled the Respondents' conduct. The Ministry again participated as an *amicus* before the Second Circuit. Diplomatic Correspondence between Embassy for the People's Republic of China and the United States Department of State, Dkt. 111-3, Case No. 13-4791 (2d Cir. May 23, 2014).

The Second Circuit issued its unanimous opinion on September 20, 2016. 837 F.3d 175 (2d Cir. 2016). The court held that the district court abused its discretion by not abstaining from exercising jurisdiction on international comity grounds. In particular, the court of appeals held that, given the Ministry's appearance in the case, the district court had erred by failing to give conclusive deference to the Ministry's reasonable interpretation of Chinese law, as required by this Court in *Pink*. Pet. App. 11a-12a. The Second Circuit applied the international comity balancing test developed by the circuit courts in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). *See also O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451-52 (2d Cir. 1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). The Second Circuit concluded that the Ministry's explanation, together

with the record available at the motion to dismiss stage, established conclusively that it was impossible for Respondents to comply with both Chinese law and the Sherman Act. Pet. App. 27a-33a. In addition, the court found that each of the remaining *Timberlane* and *Mannington Mills* comity abstention factors "decidedly weigh[ed] in favor of dismissal and counsel[ed] against exercising jurisdiction in this case," Pet. App. 34a, a point which Petitioners never contested. Accordingly, the Second Circuit vacated the district court's judgment, reversed the order denying the motion to dismiss, and remanded with instructions to dismiss with prejudice. Pet. App. 38a.

Petitioners filed a petition for rehearing *en banc* on October 4, 2016, which was denied without noted dissent on November 4, 2016. Dkt. 259, Case No. 13-4791 (2d Cir. Nov. 4, 2016). The petition for a writ of *certiorari* followed.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' ASSERTIONS THAT THE PANEL SHOULD NOT HAVE REVIEWED THE DISTRICT COURT'S MOTION TO DISMISS ORDER DO NOT PRESENT A QUESTION MERITING THIS COURT'S REVIEW

1. Petitioners argue that the Second Circuit should not have reviewed Respondents' pre-trial motion to dismiss after trial was held and that Respondents' international comity arguments were not properly preserved in post-trial motions. Pet. 19-20, 22. But international comity abstention implicates a federal court's exercise of subject matter jurisdiction and is an issue for the court, not a jury. *See, e.g., JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005)

("International comity . . . involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it[.]"). Respondents therefore properly moved to dismiss principally under Rule 12(b)(1), arguing *inter alia* that the court should decline jurisdiction on the basis of international comity. Dkt. 67 at 2-3, 33, Case No. 06-md-01738 (E.D.N.Y. Sept. 22, 2006); *see also, e.g., Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1259 (11th Cir. 2006) (affirming dismissal on the basis of international comity in response to Rule 12(b)(1) motion); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 737 (S.D.N.Y. 1997) (dismissing antitrust claims for lack of jurisdiction based on *Timberlane* factors). Respondents appealed the denial of their motion to dismiss on international comity grounds to the Second Circuit, and Petitioners offer no compelling argument for disturbing the Second Circuit's decision to review that order.

2. International comity abstention was an explicit basis for Respondents' motion to dismiss. Respondents expressly appealed "all" pre-judgment orders, noted the failure to dismiss the case on international comity grounds among the questions presented on appeal, cited the standard of review for a denial of a motion to dismiss on international comity grounds, and asserted dismissal on comity grounds as specific headings in their opening and reply briefs. Nonetheless, prior to their petition for rehearing *en banc*, Petitioners never argued or even suggested that the Second Circuit could not review the order on Respondents' motion to dismiss or that Respondents had not properly preserved their international comity abstention argument. There is no reason for this Court to review a purely procedural

question that Petitioners never raised below. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998).

3. Petitioners claim for the first time before this Court that the comity issue was somehow waived because it was not presented in a motion under Federal Rule of Civil Procedure 50(a). Pet. 21-22. Petitioners waived their waiver argument by not presenting it below. And in any event, Petitioners' argument incorrectly conflates the compulsion issue—a factual defense tried to the jury—with the comity issue in which the jury has no role. Respondents raised the question of comity at all appropriate points before the district court. The comity issue was not put before the jury (as Rule 50(a) assumes) because it is an issue for the court, not an issue for the jury. Indeed, the jury did not consider comity at all and was not shown the most relevant evidence—Chinese regulations and the Ministry's explanation of their meaning.

Moreover, comity does not implicate jury-triable issues and instead goes to the threshold question of whether a court should decline to exercise jurisdiction over a matter. The law clearly allows appellate review of abstention of jurisdiction even where not adequately raised at the district court level. *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). Indeed, "abstention may be raised by the [appellate] court *Sua sponte*." *Id.* Courts have also routinely held that international comity issues cannot be waived. *See, e.g., Fortino v. Quasar Co., a Div. of Matsushita Elec. Corp. of Am.*, 950 F.2d 389, 391 (7th Cir. 1991) ("Comity . . . is an accepted reason for an appellate court to consider issues that would otherwise have been deemed waived because not raised in [a] timely fashion[.]"); *Allstate Life Ins. Co. v. Linter Grp. Ltd.*,

994 F.2d 996, 1000 (2d Cir. 1993) ("The presence of [New York forum selection and choice of law] clauses, however, does not preclude a court from granting comity where it is otherwise warranted."). The Second Circuit thus acted properly in reviewing Respondents' comity argument as a threshold challenge.

4. The decision below does not create a circuit split as this case does not present the issue suggested by Petitioners. Pet. 19-20. In fact, reversal with instruction to dismiss is among the more common dispositions on appeal, and it is the only appropriate course if the district court erred in exercising jurisdiction. *See Raines v. Byrd*, 521 U.S. 811, 830 (1997) (on direct appeal, vacating judgment of district court and "remand[ing] with instructions to dismiss the complaint for lack of jurisdiction"); *Moore v. Sims*, 442 U.S. 415, 434 (1979) (reversing judgment of district court and remanding with instructions to dismiss the case after finding district court should have abstained); *Briscoe v. Bell*, 432 U.S. 404, 415 (1977) (finding that courts below erred in finding they had jurisdiction and vacating with instructions to dismiss the complaint).

Petitioners rely on cases involving refusal to review pre-trial orders issued under Federal Rule of Civil Procedure 12(b)(6)—not jurisdictional challenges under Rule 12(b)(1). Pet. 20. In *Nolfi v. Ohio Kentucky Oil Corp.*, the Sixth Circuit held that after a trial on the merits has occurred, it could not review the district court's denial of a Rule 12(b)(6) motion to dismiss for failure to plead a Section 10(b) securities claim with sufficient particularity. 675 F.3d 538, 545 (6th Cir. 2012). In *ClearOne Communications, Inc. v. Biamp Systems*, the Tenth Circuit ruled that it would be improper to review a

denial of pre-trial motion to dismiss for failure to state a claim premised on the conclusion that additional factual development would be necessary. 653 F.3d 1163, 1172 (10th Cir. 2011). For the same reason, the Tenth Circuit declined to review the pre-trial order denying the appellant's Rule 12(b)(6) motion to dismiss seeking resolution of a purely legal question in *In re Gollehon*, No. CO-14-031, 2015 WL 1746496, at *5 (B.A.P. 10th Cir. Apr. 17, 2015). And in *Bennett v. Pippin*, the Fifth Circuit held that because "Rule 12(b)(6) measures the sufficiency of the plaintiff's allegations[,] a district court's denial of a Rule 12(b)(6) dismissal becomes moot" after a full trial on the merits. 74 F.3d 578, 585 (5th Cir. 1996).

By contrast, appellate courts routinely review, after a full trial on the merits, orders involving Rule 12(b)(1) motions to dismiss. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006) ("The objection that a federal court lacks . . . jurisdiction may be raised by a party . . . at any stage in the litigation, *even after trial and the entry of judgment*. By contrast, the objection that a complaint fail[s] to state a claim upon which relief can be granted . . . may not be asserted post-trial.") (citations omitted) (emphasis added); *In re Lorazepam & Clorazepate Antitrust Litig.*, 631 F.3d 537, 540-41 (D.C. Cir. 2011) ("As far as jurisdiction is concerned, it does not matter if he should have recognized this sooner. *Capron* holds that the parties cannot confer jurisdiction by consent."). Indeed, this Court has consistently called for resolving jurisdictional questions at the earliest possible stage. *Cf. Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. __, 137 S. Ct. 1312, 1314 (2017) (jurisdictional question involving foreign sovereign's immunity from suit should ordinarily be resolved "as near to the outset of

the case as is reasonably possible" (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983)). The Second Circuit's procedural approach thus conforms to the unanimous practice of federal courts reviewing threshold questions.

5. Finally, even if Petitioners correctly identified a circuit split—and they have not—this case is a poor vehicle for resolving it. Regardless of which order the Second Circuit reviewed, only one outcome was possible: dismissal.

The Second Circuit accepted the Ministry's views as conclusive for purposes of establishing a conflict between Chinese and U.S. law. Pet. App. 33a. In addition, the court found that the record available at the motion to dismiss stage was sufficient to decide that the remaining comity abstention factors "decidedly weigh[ed] in favor of dismissal and counsel[ed] against exercising jurisdiction[.]" *Id.* 34a. The record developed after the motion to dismiss stage was therefore irrelevant to the decision below, regardless of which specific district court order was reviewed. The Second Circuit's decision to review the motion to dismiss rather than the Rule 50 motions therefore was not dispositive. This fact further militates against review of the first question presented.

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED A TRUE CONFLICT BETWEEN U.S. AND CHINESE LAW, AND THERE IS NO CIRCUIT SPLIT ON THE NARROW ISSUE DECIDED IN THE OPINION BELOW

1. Under the decisions of this Court and of the lower courts, abstention on international comity grounds is warranted where there is a "true conflict"

between U.S. and foreign law. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-98 (1993) (citation omitted); *see also Mannington Mills*, 595 F.2d at 1297; *Timberlane Lumber*, 749 F.2d at 1384. A "true conflict" exists where foreign law requires activity "in some fashion prohibited by the law of the United States" or where "compliance with the laws of both [the United States and the foreign country] is otherwise impossible." *Hartford Fire*, 509 U.S. at 799.

2. Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. Agreements to set prices or output volumes are *per se* violations of Section 1. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). "Any combination which tampers with price structures is engaged in an unlawful activity." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). It is the act of coordination itself—not agreement on any specific price or output level—that violates the Act. Even agreements to set "reasonable" prices or output levels are *per se* unlawful. *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969); *Socony-Vacuum*, 310 U.S. at 224 n.59; *see also Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (use of "uniform list price in most instances only as a starting point, is of no consequence"; illegal per se because it "*was* a starting point" and "was in some instances . . . respected and followed").

The only relevant question is thus whether Chinese law required coordination on export price or volume. And Petitioners *conceded* this conflict in their briefing below: "Chinese law . . . required the Chamber and its Subcommittee to actively coordinate to set vitamin C export prices and quantities." Dkt. 174 at 25, Case No. 13-4791 (2d Cir. Aug. 11, 2014).

The Second Circuit, properly deferring to the Ministry's explanation of Chinese law and considering it together with the record on the motion to dismiss, reached the same conclusion.[2]

The Second Circuit observed that the Ministry's explanation established that vitamin C manufacturers were "compelled . . . to set and coordinate vitamin C prices and export volumes" under the 1997 Notice. Pet. App. 8a. It further concluded that Respondents' conduct was compelled under the 2002 PVC system. The 2002 Notice refers to "industry-wide negotiated prices" and states that "PVC procedure shall be convenient for exporters while it is *conducive for the chambers to coordinate export price and industry self-discipline*." Dkt. 154-2 at 66, Case No. 13-4791 (2d Cir. July 28, 2014). (emphasis added). The Second Circuit properly deferred to the Ministry's reasonable explanation that these references to "negotiated" and "coordinate[d]" prices mean that vitamin C manufacturers remained obligated under the 2002 Notice to negotiate and agree on a minimum export price. Pet. App. 27a. The Second Circuit further credited the Ministry's reasonable explanation that terms such as "industry self-discipline," "coordination," and "voluntary restraint" are terms of art of Chinese regulatory policy "connoting the government's expectation that private actors actively self-regulate to achieve the government's policy goals." *Id.* 28a. In other words, the PVC regime was a

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[2] The Second Circuit recognized that in some cases a trial court may require discovery on the "countervailing interests and policies" before ruling on comity. In this case, however, the record available at the motion to dismiss stage was "sufficient to determine what Chinese law required and whether abstention was appropriate." Pet. App. 37a n.14.

decentralized means of regulation whereby the Ministry would adopt the export prices that the industry was directed to negotiate. *Id.*

The Second Circuit therefore concluded that there was a true conflict between U.S. and Chinese law because under both the 1997 and 2002 Notices, vitamin C manufacturers were required to coordinate to set a minimum export price and thereby violate the Sherman Act. Pet. App. 33a. The court properly rejected Petitioners' argument that there was a conflict only if Chinese law required agreement on a specific price, an argument wholly contrary to this Court's seminal decisions in *Trenton Potteries* and *Socony*, but which the district had accepted. *Id.* 28a, 32a-33a.

3. This Court's precedent calls for precisely the degree of deference to a foreign sovereign's statements regarding the meaning of their own laws that was applied by the Second Circuit. In *United States v. Pink*, the Court considered the extraterritorial effect of the Russian decrees of nationalization in light of a declaration from the Soviet Commissariat for Justice provided through diplomatic channels at the request of the United States. 315 U.S. at 219. Finding that the Commissariat was empowered to interpret Russian law, the Court "[did] not stop to review all the evidence in the voluminous record" and accepted the Commissariat's official declaration as "conclusive." *Id.* at 217-18, 220. Consistent with *Pink*, the Second Circuit held here that conclusive deference is due where (1) an entity of a foreign sovereign authorized to interpret the relevant law appears before a U.S. court and (2) offers an interpretation of the foreign sovereign's domestic law that is (3) reasonable under

the circumstances presented.[3] *Accord Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (accepting Chilean government's interpretation of Chilean domestic law).

4. There is no circuit split on the narrow issue decided by the Second Circuit—the degree of deference owed to a foreign government when it appears formally in a case. None of the cases cited by Petitioners conflicts with the Second Circuit's decision. In *Access Telecom, Inc. v. MCI Telecommunications Corp.*, defendants relied on an official circular produced outside of the litigation by a Mexican administrative agency. 197 F.3d 694, 714 (5th Cir. 1999). No agency representative appeared before the court at any stage in the proceedings to endorse the circular, and, in any event, it was not clear that the agency was authorized to interpret, rather than simply enforce, Mexican law. *Id.*; *cf.* Pet. App. 6a (the Ministry is the "highest authority within the Chinese government authorized to regulate foreign trade" and provided a statement on the meaning of regulations that the Ministry itself issued).

United States v. McNab did not even concern the meaning of Honduran law or a conflict between U.S. and Honduran law, and in any event it is clearly distinguishable. The question in *McNab* was merely whether Honduran regulations were valid during the relevant time period. 331 F.3d 1228 (11th Cir. 2003). The Honduran government had consistently

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[3] Petitioners mistakenly contend that there was no "sworn evidentiary proffer" in this case. Pet. 17 n.5. As the Second Circuit noted, the "proffer" in this case is not the Ministry's amicus brief itself but the Mitnick Declaration attached to the brief, which provided authenticated copies of the regulations cited by the Ministry. Pet. App. 8a n.6.

represented that the defendants had violated valid Honduran regulations throughout the U.S. Government's investigation and prosecution of Lacey Act violations. *Id.* at 1233-35. Only after the defendants were convicted did the Honduran government change course and contend in an *amicus* brief filed by the Honduran Embassy that the underlying Honduran regulations were invalid. *Id.* at 1240. Faced with conflicting statements by Honduran government officials, the court conducted its own evaluation of the validity of the regulations at issue. *Id.* at 1242. In sharp contrast, in this case the Chinese government has consistently maintained that Respondents were required under Chinese law to coordinate export prices. Moreover, the Eleventh Circuit's decision expressly approved district courts generally deferring to the statements of "foreign officials charged with enforcing the laws of their country," deeming such statements to be "[a]mong the most logical sources for the court to look to in its determination of foreign law." *Id.* at 1241. The holding in *McNab* thus entirely aligns with the Second Circuit's approach.

Petitioners' reliance on *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012), is similarly misplaced. Iran conceded that Iranian law provided for a private cause of action under the Treaty of Amity but argued that the Treaty did not allow a plaintiff to invoke that cause of action in a U.S. court. Iran's arguments on this point concerned the text, context, and practical consequences of the Treaty, not Iran's domestic law. *Id.* at 1079-80. Moreover, Iran had offered numerous arguments and affidavits on various points of Iranian law in the course of a contentious, decades-long litigation arising under the Treaty of Amity, through

which Iran had voluntarily subjected itself to the jurisdiction of U.S. courts. *Id.* at 1070-72. The court properly declined to defer to Iran's interpretations that were inconsistent with its prior statements. *See, e.g., id.* at 1081-82 (finding that Iran's argument that its domestic law precluded liability for the actions of the government's agents was "fatally flawed" because it contradicted Iran's representations that the Treaty of Amity was *lex specialis* superseding Iranian general law); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (declining to defer to Iran's argument that Iranian law mandated a "come to the company" requirement for dividend payments in light of Iran's own affidavits stating merely that there was a strong presumption that Iranian companies would pay dividends in that way), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003). In this case, the Ministry's statement concerned the meaning of China's domestic laws and regulations, not a treaty, and its representations remained consistent throughout the litigation.

In *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), the Republic of El Salvador filed an *amicus* brief arguing that a suit under the U.S. Alien Tort Claims Act and Torture Victims Protection Act should not proceed because it would interfere with the Salvadoran Amnesty Law. Brief of *Amicus Curiae* The Republic of El Salvador in Support of Appellant at 4-5, *Chavez v. Carranza*, Case No. 06-6234 (6th Cir. Apr. 18, 2008). In other words, the foreign government merely articulated a conflict between the goals of a domestic policy initiative and the proposed application of U.S. law. However, the brief pointed to no provision of the Amnesty Law suggesting that it was intended to preclude prosecution or liability

outside of El Salvador. Indeed, the Sixth Circuit noted that the Amnesty Law "*cannot* be interpreted to apply extraterritorially." 559 F.3d at 495 (emphasis added). Accordingly, the court was not bound to defer. *Cf.* Pet. App. 25a n.8 (deference may not be appropriate where a foreign sovereign's interpretation is not supported by "documentary evidence or reference of law" (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 92 (2d Cir. 2002)). Here, the Ministry offered a reasonable interpretation of specific ambiguous provisions of the relevant Chinese regulations. Pet. App. 27a-28a.

Finally, *In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992), cited by Petitioners as conflicting with the decision below, Pet. 26-27, in fact confirms the rule that conclusive deference is owed to a foreign sovereign when the conditions of the Second Circuit's holding are met. The Republic of France appeared as a party and offered an interpretation of an ambiguous provision of French law that the court confirmed was "plausible" based on the text of the provision. 954 F.2d at 1312. The court's observation that the French government had consistently advanced the same position in other disputes serves merely as confirmation that the French government's position in *Amoco* was reasonable. *Id.* Although the Seventh Circuit used language of "substantial deference," neither its conclusion nor its approach differs from the Second Circuit's below. *Id.* ("If all of the litigants were private parties, we would need to decide whether this understanding of the law is correct. But the Republic of France appears in this court and assures us that Article 16 applies to oil that reaches shore. . . . Giving the conclusions of a sovereign

nation less respect than those of an administrative agency [under *Chevron*] is unacceptable.").

In sum, each of the cases cited by Petitioners as inconsistent with the decision below either afforded similarly conclusive deference to the foreign sovereign or involved circumstances where (1) the foreign sovereign did not formally appear before the Court, (2) the foreign sovereign did not interpret its own domestic law, and/or (3) the foreign sovereign offered an obviously unreasonable interpretation under the circumstances. There is thus no conflict in the lower courts regarding the degree of deference owed to a foreign sovereign's interpretation of its own domestic law when formally presented to a U.S. court, and the Second Circuit's adherence to this Court's guidance in *Pink* does not warrant review.

5. Nor is there any reason to revisit the basic principle of deference affirmed in *Pink*. Indeed, this case exemplifies the need for a clear rule of conclusive deference given the "unique and complex nature of the Chinese legal- and economic-regulatory system and the stark differences between the Chinese system and ours." Pet. App. 29a. A clear rule of conclusive deference is particularly important in antitrust cases, which the Second Circuit recognized may present "unique international concerns." *Id.* 15a. The deference standard set out in *Pink* allows courts to more capably and credibly balance the competing sovereign interests at stake in antitrust cases involving foreign conduct: the U.S. Government's interest in protecting American commerce and foreign governments' interests in regulating their own economies. *Cf. F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's

ability independently to regulate its own commercial affairs.").

6. Petitioners' speculation that foreign governments might be improperly influenced to protect defendants in U.S. proceedings, Pet. 27-28, provides no reason for this Court's review. The passage Petitioners cite from *United States v. McNab* has no bearing on the issues presented by this case. The concern expressed by the Eleventh Circuit in *McNab* was that a foreign government might retroactively invalidate its laws to frustrate application of the Lacey Act, which depends upon violation of foreign law as a predicate. 331 F.3d at 1242. This has nothing to do with representations made by foreign governments as to the meaning of their existing laws before U.S. courts. Petitioners cannot point to any case where a foreign sovereign has subverted a U.S. tribunal by falsely asserting a conflict between its law and U.S. law or by manufacturing such a conflict for purposes of litigation.

In addition, courts already have the flexibility to take jurisdiction in appropriate cases, even where the court is bound to defer to a foreign sovereign's representation that there is a true conflict between U.S. and foreign law. The *Timberlane* and *Mannington Mills* comity balancing test applied below sets out additional relevant factors bearing on whether abstention is appropriate. *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane Lumber*, 549 F.2d at 614-15. The Second Circuit found that every one of these nine factors "decidedly weigh[s] in favor of dismissal and counsel[s] against exercising jurisdiction" in this case, Pet. App. 34a, and Petitioners have never disputed that conclusion.

Finally, defining a rule of law on the basis of speculation that a foreign government might improperly impede the application of U.S. law in a U.S. court is antithetical to the principles of foreign relations. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[C]ourts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). The district court's speculation about the Chinese government's motives illustrates the problem. The Chinese government made an unprecedented appearance before a U.S. court to provide the district court with the benefit of a clear, authoritative explanation of Chinese law. Pet. App. 6a n.5. In return, the district court suggested that the Chinese government's chosen regulatory scheme was a "post-hoc attempt to shield defendants' conduct from antitrust scrutiny." *Id.* 121a-122a. The Chinese government subsequently filed an official diplomatic statement with the U.S. Department of State protesting its treatment and reconfirming the "great importance" it places on proper respect for its sovereignty before the courts of other nations. Diplomatic Correspondence between Embassy for the People's Republic of China and the United States Department of State, Dkt. 111-3, Case No. 13-4791 (2d Cir. May 23, 2014). This shows that diplomatic negotiations and multilateral institutions, not private lawsuits in federal court, provide the proper forum for resolving any concerns the United States may have with Chinese export policies.

The significant international tension caused by the district court's reasoning shows the wisdom of the rule of deference announced in *Pink* and faithfully applied by the decision below. Speculation about potential gamesmanship by foreign governments need not raise concerns, for the Second Circuit's

holding expressly requires that the proffered interpretation be "reasonable" to receive deference. The Court therefore has no cause to revisit that rule and every reason to allow the controversy presented by this case to end here.

III. THERE IS NO REASON TO DISTURB SETTLED LOWER COURT LAW ON THE APPLICABILITY OF INTERNATIONAL COMITY IN ANTITRUST CLASS ACTIONS

Petitioners' final question presented asks the Court to wade into an academic debate over the propriety of international comity abstention *vel non*. Whatever academic interest the question may hold, it does not in any way meet this Court's criteria for review.

1. As a threshold matter, Petitioners have waived their argument that international comity abstention should not apply on a case-by-case basis because they failed to raise it at any stage in the proceedings below. Respondents have consistently urged the courts below to dismiss this case as a matter of international comity. In response, Petitioners conceded that the doctrine remains valid, but argued only that comity abstention does not apply because the evidence of conflict, in their (incorrect) view, was insufficient. Petitioners have never argued (until now) that the multifactor test outlined in *Timberlane* and *Mannington Mills* can no longer be applied to abstain on a case-by-case basis. Even in their motion for rehearing *en banc*, with full knowledge of the Second Circuit's reasoning, Petitioners did not contend that the Second Circuit erred in analyzing international comity under that test.

Despite ample opportunity to do so, nowhere below have Petitioners argued that courts cannot abstain from exercising jurisdiction on a case-by-case basis. Petitioners should not be allowed to assert this argument for the first time before this Court.

2. Even if Petitioners had argued this issue below, Petitioners' request for relief would effectively eliminate the comity abstention doctrine as a judicial consideration. Such a result would overturn decades of settled law without justification.

This Court has long recognized that international comity is a fundamental judicial consideration guiding the exercise of jurisdiction in cases involving foreign parties: "[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). Indeed, "the concept of international comity requires . . . a more particularized analysis of the respective interests of the foreign nation and the requesting nation[.]" *Id.* at 543-44.

The international comity test that was formulated in *Timberlane* and supplemented in *Mannington Mills* has been settled law in the lower courts for decades.[4] Indeed, it has been formally

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[4] *See, e.g., Mujica v. AirScan Inc.*, 771 F.3d 580, 602-04 (9th Cir. 2014) (analyzing *Timberlane* factors even after finding true conflict not required for adjudicatory comity analysis), *cert. denied*, 136 S. Ct. 690 (2015); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 76 (3d Cir. 1994) ("[A]ny exercise of jurisdiction to prescribe and enforce sanctions based on the effects of foreign activity in a domestic court requires the court to balance the interests it seeks to protect against the

adopted in Section 403 of the American Law Institute's *Restatement (Third) of Foreign Relations Law of the United States*. Although Professor Hovenkamp initially criticizes the *Timberlane* comity test, his treatise further acknowledges not only that it has been "well received," but also that courts *rarely* abstain from exercising jurisdiction on comity grounds. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273 (4th ed. 2016). The *Timberlane* test hardly provides the "get out of jail free card" that Petitioners imagine. Pet. 6. Rather, "the flexibility of the comity analysis allows courts to take into account the legal, political, and economic conditions that shape foreign defendants' actions." Benjamin G. Bradshaw, *et al.*, *International Comity in the Enforcement of U.S. Antitrust Law in the Wake of In re Vitamin C*, 31 ANTITRUST 87, 91 (2017).

Despite having had an opportunity to strike down the *Timberlane* multifactor test in *Hartford Fire*, this Court expressly refused to do so after finding no true conflict between American and British law. 509 U.S. at 799 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."). Indeed, the Court's conflict of law analysis was consistent with the *Timberlane* test and with the analysis performed by the panel below. *See* Pet. App. 33a (analyzing remaining *Timberlane* comity factors after determining true conflict between U.S. and Chinese law).

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interests of any other sovereign that might exercise authority over the same conduct." (citing *Timberlane*)).

Petitioners claim that the Court rejected the *Timberlane* test in *F. Hoffmann-La Roche Ltd v. Empagran S.A.* Pet. 31. Not so. *Empagran* addressed the extraterritorial application of the Foreign Trade Antitrust Improvements Act ("FTAIA"), not whether comity abstention would be appropriate in a particular case. *See* 542 U.S. at 168-69 (discussing whether independent foreign injury cases are within the scope of the FTAIA). The Court looked to the FTAIA's language and legislative history to determine whether Congress gave federal courts statutory jurisdiction to hear cases involving purely foreign conduct. *Id.* at 169-70. That is not at issue here. *See id.* at 172-73 (acknowledging that scope of FTAIA is a separate consideration from comity concerns under *Timberlane*). Before the Second Circuit, Respondents argued that the district court should have abstained from exercising jurisdiction in this case because Chinese law compelling Respondents' conduct conflicted with American antitrust law. The panel below dismissed this case on those grounds, not because of statutory jurisdiction concerns.[5]

Petitioners' remaining authority similarly does not address international comity abstention on a case-by-case basis. In *Morrison v. National Australia. Bank Ltd.*, the Court analyzed whether Section 10(b)

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[5] This Court has noted that the U.S. Government may be able to obtain broader relief than private plaintiffs. *See Empagran*, 542 U.S. at 170 ("A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm."); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 25-26 (2017). But this case is brought by private plaintiffs, not the government.

of the Securities Exchange Act applies to cases involving securities traded on foreign exchanges. 561 U.S. 247, 261 (2010). The Court concluded that applying "judicial-speculation-made-law" was not appropriate and that instead, it should preserve "a stable background against which Congress can legislate[.]" *Id.* at 261.[6] But Congress has already legislated on the extraterritoriality of federal antitrust laws, and in doing so, made no change to the international comity abstention doctrine. *See Hartford Fire*, 509 U.S. at 798; H.R. Rep. No. 97-686, at 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the Foreign Trade Antitrust Improvements Act] would have no effect on the court['s] ability to employ notions of comity or otherwise to take account of the international character of the transaction." (citing *Timberlane*)).

3. Contrary to Petitioners' claims, Pet. 33-34, the opinion below preserves the distinction between a foreign sovereign compulsion defense and a true

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[6] The additional cases Petitioners cite also address statutory jurisdiction, which is not at issue here. *See In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-39 (8th Cir. 2007) (determining whether foreign purchases of allegedly price-fixed products were within the scope of the FTAIA); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (same). And in *Industrial Investment Development Corp. v. Mitsui & Co.*, the Fifth Circuit actually applied the *Timberlane* test. 671 F.2d 876, 885 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983). Petitioners' citation to *Industrial Investment Development Corp.* actually referred to *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980)—not *Timberlane*—and concerned the proper standard of review for a district court's decision as to whether to exercise extraterritorial jurisdiction, not whether courts should apply the *Timberlane* test. Pet. 32.

conflict for purposes of comity analysis. Whether Respondents' specific conduct—exporting vitamin C at the specific prices challenged by Petitioners—was compelled by Chinese law does not "weigh heavily" in a proper "true conflict" analysis. Pet. App. 32a-33a. The key question is whether "compliance with the laws of both countries is impossible"—that is, "whether the PVC regime, on its face, required [Respondents] to violate U.S. antitrust laws in the first instance." *Id.* (citing *Hartford Fire*, 509 U.S. at 799). The Ministry's statements, coupled with Petitioners' concession that Chinese law required coordination on price and output, resolve that question.

The panel below did not address Respondents' foreign sovereign compulsion defense and, as such, whether the Second Circuit would have ruled for Respondents on those grounds is irrelevant. *See* Pet. App. 37a-38a. The jury's factual finding on compulsion is of no concern because the most important evidence—China's statements that the conduct was compelled—was excluded from the evidence available to the jury. On the other hand, the Second Circuit found that the Ministry's official statements "should be credited and accorded deference" here. *See id.* 27a. The panel had no need to reach the compulsion defense, but there is no reason to believe the result would have been different had the court of appeals decided the case on compulsion grounds rather than comity.

4. The *amicus* brief of Professors Dodge and Stephan also fails to provide support for review of the third question presented. The *amici* rely on a section of the tentative draft of the Fourth Restatement that

has merely been presented "for discussion only."[7] Restatement (Fourth) of Foreign Relations Law of the United States, at xxi (Am. Law Inst., Tentative Draft No. 2, Mar. 22, 2016). As discussed above, Section 403 of the Third Restatement remains the official position of the American Law Institute. Further, the authorities relied on by the *amici* overlap with the cases cited by Petitioners and only address the extraterritorial scope of legislation, not whether a court should abstain from exercising jurisdiction in a particular case. *See* supra, at 28-30 (distinguishing *Empagran* and *Morrison*); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2107-08 (2016) (discussing whether RICO applies to cases involving foreign injuries). There is simply no conflict between the decision below and these cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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[7] *Cf. Bolivarian Republic of Venez.*, 137 S. Ct. at 1321 (referencing different section of Restatement (Fourth) that has been "approved" and may be "cited as representing the Institute's position until the official text is published"); *see* Restatement (Fourth) of Foreign Relations Law of the United States § 455, Reporter's Note 12, at 9 (Am. Law Inst., Tentative Draft No. 2, Mar. 22, 2016). The portion cited by amici has not been approved.

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June 5, 2017

Attorneys for Respondents

No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Pursuant to Supreme Court Rules 21, 28.4, and 28.7, Respondents Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corp. and *Amicus Curiae* the Ministry of Commerce of the People's Republic of China (MOFCOM) respectfully move that oral argument on behalf of respondents be divided and that counsel for MOFCOM be allowed 15 minutes of argument time. MOFCOM will submit an *amicus* brief supporting respondents and seeks to present oral argument on issues of significant importance to the People's Republic of China, as it did in the court of appeals. Respondents support this motion and have agreed to cede 15 minutes of argument time to MOFCOM's counsel. Accordingly, no enlargement of the time allotted for this case would be required.

MOFCOM is no ordinary *amicus*. It is a component of the central Chinese government and the highest administrative authority in China authorized to regu-

late trade between Chinese exporters and other countries. It formulates strategies, guidelines, and policies concerning domestic and foreign trade and international cooperation; drafts, enforces, and interprets trade laws and regulations; and regulates markets. MOFCOM's conduct, moreover, is at issue in this case in two respects. The core question below was whether MOFCOM's regulations required defendants to engage in conduct inconsistent with the Sherman Act, and the sole question on review here is whether the court of appeals properly deferred to MOFCOM's explanation of the meaning and effect of China's trade laws, as submitted directly to the lower courts through *amicus* submissions. MOFCOM thus has an unusually direct and significant interest in the resolution of this case, and has an unique ability to assist the Court in resolving the consideration of the question presented.

1. This case arises from a multi-district class action alleging that Respondents, Vitamin C manufacturers operating and incorporated in China, conspired to fix the price and supply of vitamin C sold on the international market in violation of the Sherman Act. Pet. App. 2a. Respondents did not dispute that they entered into price- and supply-fixing arrangements, but argued that those agreements were compelled by Chinese law and therefore dismissal was required on the grounds of (inter alia) international comity. Cf. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993).

In an effort to assist the district court in determining what Chinese law required defendants to do, MOFCOM filed an *amicus* brief in 2006 in the district court, explaining the regulatory regime governing Vitamin C production and ex-

ports in China and setting forth the Chinese government's authoritative interpretation of Chinese law. MOFCOM reaffirmed its position in supplemental statements made to that court in 2008 and 2009, and in a second *amicus* brief submitted to the court of appeals in 2014. MOFCOM also participated in oral argument in the Second Circuit. As both courts below observed, this was "historic." Pet. App. 6a. Never before had "any entity of the Chinese Government ... appeared *amicus curiae* before any U.S. court." *Id.* n.5.

The district court, however, rejected MOFCOM's explanation of Chinese law, accused the Chinese Government of submitting "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny" rather than "a frank and straightforward explanation of Chinese law," Pet. App. 120–21a, and devised its own interpretation, ostensibly based on the "plain language" of translated Chinese-language materials, that contradicted MOFCOM's interpretation. *Id.* at 97a. In sum, the district court gave no deference to MOFCOM's submission in this case.

The court of appeals reversed, holding that the district court erred in refusing to defer to MOFCOM's "reasonable" interpretation of Chinese law, and then went on to order the case dismissed on comity grounds. It explained that the district court's interpretation rested on several significant analytical errors and would have produced "nonsensical" results, Pet. App. 27a–28a, 30a–33a; that MOFCOM's explanation of the Chinese regulatory regime was clear and consistent with the underlying materials, *id.* at 27a–28a; and that the courts were therefore bound to defer to MOFCOM's reasonable explanation under *United States* v. *Pink*, 315 U.S. 203

(1942); Pet. App. 20a, 25a. This Court granted certiorari to review the degree of deference due to a foreign sovereign's reasonable explanation of its own laws, as submitted directly to the court by the foreign government. *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 734 (2018) (mem.); see Pet. i.

2. MOFCOM's participation at oral argument will aid the Court in two significant respects.

First, MOFCOM is uniquely positioned to assist the Court in considering what weight should be accorded to MOFCOM's official interpretation of Chinese law. The Chinese Government plainly has a strong interest in the resolution of that question, both in this case and as it will impact future cases. As noted, this marks the first appearance of any Chinese Government body as an *amicus* in a U.S. court. And the district court's disrespectful rejection of MOFCOM's position prompted a formal diplomatic protest from the Chinese Embassy to the State Department, highlighting that "China has attached great importance to this case," urging the United States to support MOFCOM's position, and reiterating that MOFCOM's submissions correctly "described China's compulsory requirements concerning vitamin C exports." JA782–84.

Moreover, as an agency and representative of a foreign government, MOFCOM is ideally situated to explain to the Court the important interests that a foreign government might have in the deference question at issue. In particular, MOFCOM has direct insight into the importance of deference where, as here, the foreign legal system differs substantially from the American legal system. In such

cases, a weak or indeterminate deference rule that allows lower courts to lightly cast aside official foreign legal interpretations would not only invite error, but incentivize parties to attack the candor and motives of the foreign sovereign (as Petitioners have done throughout this case), discourage foreign sovereigns from appearing in U.S. courts, and subject private parties to conflicting legal obligations when U.S. courts adopt wrong interpretations of foreign law. MOFCOM's participation at oral argument would likely aid the Court in analyzing these significant issues, just as MOFCOM's appearance at argument assisted the Second Circuit below.

Second, MOFCOM is uniquely positioned to address the underlying question of whether MOFCOM's interpretation of Chinese law merits deference. The regulations and directives in question were issued and enforced by MOFCOM, as well as by subordinate bodies that exercised authority delegated to them by MOFCOM. Pet. App. 28a. As the record reflects, see JA142, and as MOFCOM's *amicus* brief will further illustrate, MOFCOM's interpretation of these regulations and policies carries decisive weight under Chinese law. MOFCOM can therefore assist the Court like none other in understanding the terms of art used in the Chinese regulatory regime and the consistency of MOFCOM's position in these proceedings with China's position in World Trade Organization proceedings, and otherwise in appreciating the compulsory nature of the export regime established by MOFCOM.

3. To grant MOFCOM leave to participate in oral argument would be consistent with the Court's prior practice. Just as the Court grants the Solicitor General leave to argue where the meaning of federal law is at issue in a dispute be-

tween private parties, *e.g.*, *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 51 (2017) (mem.), it should grant MOFCOM leave to appear in this case, where MOFCOM's regulations and its (and the Chinese Government's) official interpretation of those regulations are at issue. Indeed, the Court has previously granted foreign governmental bodies leave to participate in oral argument in analogous circumstances. *E.g.*, *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 541 U.S. 901 (2004) (European Commission); *Air France v. Saks*, 469 U.S. 1103 (1985) (Government of France). It should do so again here.

4. The Solicitor General has sought leave to participate in the oral argument and to divide time with Petitioners' counsel. If the Court follows its usual practice and allows the Government of the United States to argue in support of Petitioners, it should likewise hear from the Government of China in support of Respondents. Respondents and MOFCOM respectfully submit that granting divided argument on both sides, and thus allowing both directly interested sovereigns to participate, will best ensure a full and fair presentation of the issues, including the far-reaching ramifications that would follow from adopting the unprecedented approach urged by Petitioners and the Solicitor General.

Respectfully submitted,

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No. 16-1220

Animal Science Products, Inc., et al.,

Petitioners,

v.

Hebei Welcome Pharmaceutical Co., Ltd., et al.,

Respondents.

I, Carter G. Phillips, do hereby certify that, on this twenty-second day of March, 2018, I caused three copies and an electronic copy of the Joint Motion For Leave To Participate In Oral Argument And For Divided Argument in the foregoing case to be served by first class mail, postage prepaid, and by email, on the following parties:

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No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

According to Respondents (and the Second Circuit), federal courts may decline to exercise valid federal-question jurisdiction on the basis of a discretionary ten-factor comity inquiry that can be considered before, during, or after trial in any given case. Worse, the Second Circuit's decision deepens an entrenched circuit split by permitting foreign sovereigns to commandeer that inquiry by filing an amicus brief asserting a legal interpretation that the court is "bound" to accept, even where the record overwhelmingly refutes that interpretation. Compounding these errors, the panel disregarded the limits of its own appellate jurisdiction—in conflict with governing law in its sister circuits—in order to reach its chosen result.

The panel's freewheeling comity inquiry invites the Judiciary to second guess Congress's power to define the scope of federal subject-matter jurisdiction based upon foreign policy considerations that the Constitution commits to the Executive. Review in this Court is warranted and necessary on all three questions.

ARGUMENT

A. This Court Should Decide Whether *Ortiz* Extends to Orders Denying a Motion to Dismiss.

1. Respondents do not dispute that the panel's exercise of appellate jurisdiction over an interlocutory pre-trial motion to dismiss, following a full trial on the merits, conflicts with the weight of circuit precedent

interpreting *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). Unable to identify even one post-*Ortiz* decision supporting the panel's decision, Respondents conflate the substantive defense of comity with the procedural vehicles by which such a defense may be raised on appeal. All of Respondents' arguments are distractions from the conclusion that flows naturally from *Ortiz*: following trial, the panel lacked jurisdiction to adjudicate Respondents' pre-trial motion to dismiss as if the trial had never occurred.

2. Following *Ortiz*, and until the decision below, the courts of appeals consistently held that interlocutory motions to dismiss under Rule 12 may not be appealed after a trial pursuant to 28 U.S.C. § 1291. Pet. 19-20. Respondents do not dispute this, but instead submit that *Ortiz* is inapplicable because the defense of comity "implicates" a court's subject-matter jurisdiction. Opp. 30. But Respondents have never challenged the District Court's subject-matter jurisdiction. The doctrine of "international comity" is a discretionary abstention doctrine, raised as an affirmative defense, and plaintiffs have no burden to show the *absence* of comity concerns to establish jurisdiction. *See Drexel Burnham Lambert Grp. Inc.* v. *Galadari*, 777 F.2d 877, 880 (2d Cir. 1985). Thus, the principle that courts must ensure subject-matter jurisdiction at every stage of litigation is inapposite.

Even if "reversal with instruction to dismiss is . . . the only appropriate course if the district court erred in exercising jurisdiction," Opp. 14, that banal principle confuses trial court and appellate jurisdiction, which are governed by different statutes. In all of

Respondent's cited cases, appellate jurisdiction was established by a provision other than § 1291, and in each case that jurisdiction ran to a final order of the district court. *Raines* v. *Byrd*, 521 U.S. 811, 817-18 (1997); *Moore* v. *Sims*, 442 U.S. 415, 435 (1979); *Briscoe* v. *Bell*, 432 U.S. 404, 415 (1977).

The assertion that "the jury has no role" in a comity defense, Opp. 13, also misses the mark. Factual considerations are part of the ten factor "comity balancing test." App. 15a-16a. The District Court appropriately reserved for itself the interpretation of Chinese law (including facts relevant to that determination), while permitting the jury to receive evidence relevant to the factual underpinnings of Respondents' foreign sovereign compulsion and international comity defenses, App 42a-43a, 143a, including whether Chinese law as articulated by the Ministry was *ever* enforced as such. App. 14a-16a. The District Court appropriately exercised its discretion to postpone consideration of the multifarious *Timberlane* factors until a more thorough record than existed before trial. Pet. 21 n.6 (collecting cases). Once developed, that record cannot be retroactively erased. *Ortiz*, 562 U.S. at 184.

2. Respondents misleadingly claim that the post-*Ortiz* cases involved Rule 12(b)(6) motions, whereas Respondents supposedly "moved to dismiss *principally* under Rule 12(b)(1)." Opp. 12 (emphasis added). But Respondents moved to dismiss citing *both* Rule 12(b)(1) *and* 12(b)(6) in the alternative, noting authority holding that such defenses fall under Rule 12(b)(6)—including *Timberlane* itself. Dkt. 67 at 3, Case No. 06-

md-1738 (E.D.N.Y. Sept. 22, 2006). Rule 12(b)(1)'s text addresses motions to dismiss for "lack of subject matter jurisdiction," whereas the comity defense argues that a court should decline subject-matter jurisdiction that it otherwise could lawfully exercise. Further, Rule 12 merely specifies procedural mechanisms for raising defenses in a district court. Whatever the vehicle—(b)(1) or (b)(6)—a court of appeals only has jurisdiction to review "final decisions" resulting from their disposition. 28 U.S.C. § 1291.

Respondents argue that "appellate courts routinely review, after a full trial on the merits, orders involving Rule 12(b)(1) motions to dismiss," Opp. 15, but fail to cite a single case that involved § 1291 review of a pretrial order after trial. For example, in *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), Opp. 15, the defendant moved to dismiss for lack of subject-matter jurisdiction *after* trial; the district court *granted* the motion, and the court of appeals affirmed that final order. *Id.* at 504. In any event, the question is not whether courts may review orders "involving" 12(b)(1) motions when those motions are properly raised after trial, but whether an appellate court may review an interlocutory pre-trial order, after trial, based on the pre-trial factual record.

3. Respondents' vehicle concerns are overstated. Certiorari is warranted to ensure the uniformity and integrity of appellate jurisdiction under 28 U.S.C. § 1291. *See* Sup. Ct. R. 10. And the question is cleanly presented because the panel reviewed and ruled on only the motion to dismiss. App. 2a n.2. The hypothetical question whether the panel could have

granted the same relief based upon the comity defense in Respondents' Rule 50 motion is at most an issue for remand. *See Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

The panel's improper exercise of jurisdiction over Respondents' motion to dismiss was likely dispositive, Pet 22, but at minimum it was not harmless. Sitting in 2016, the panel purported to freeze the record as it existed in 2006, and held that the District Court abused its discretion in failing to abstain at the outset of the case. App. 2a n.2, 4a n. 3, 36a-37a & n.14. Even so, the panel cited material from *outside* the motion-to-dismiss record. App. 35a-36a. Conversely, by purporting to limit its review to the motion-to-dismiss record, the panel excluded evidence of China's contradictory statements to the WTO about the meaning of its own laws that—even if Respondents' reading of the panel's standard is correct—should have changed its analysis. App. 74a.

Respondents wrongly suggest that Petitioners failed to raise an *Ortiz* argument below. Opp. 12-13. Respondents did not urge review of their motion to dismiss in their merits briefing below, Pet. 16 n.4, instead invoking § 1291 jurisdiction over the District Court's final orders. Dkt. 175 at 2-3, No. 13-4791 (2d Cir. Aug. 11, 2014). Petitioners cited *Ortiz* in response to Respondents' attempt to re-litigate the District Court's pretrial orders. Dkt. 174 at 27, No. 13-4791 (2d Cir. Aug. 11, 2014). Petitioners could not have anticipated that the panel would review an order outside its § 1291 jurisdiction, and timely objected to that error in the rehearing petition. App. 280a.

B. This Court Should Resolve the Longstanding Split on the Standard of Deference Owed to Foreign Sovereign Interpretations of Foreign Law.

1. Respondents do not contest that the second question presented is vitally important, that further percolation would be pointless, or that the standard of deference was dispositive below. Instead, Respondents attempt to minimize the split and argue the merits.

2. The split of authorities is real and persistent. Respondents' attempt to harmonize the facts of each conflicting case fails to make the cases' legal tests compatible. The Sixth and D.C. Circuits perform an independent analysis of foreign law, regardless of a foreign sovereign's contrary arguments, Pet. 24-25, and the D.C. Circuit has openly questioned whether *any* standard of deference is permissible, Pet. 24. The Eleventh Circuit holds that while a foreign government's amicus brief is a "logical" place to look for "reliable and accurate" information, it is not entitled to conclusive deference, nor (in circumstances like this very case) any at all. Pet. 25-26. In the Fifth Circuit, courts "*may* defer to foreign government interpretations," Pet. 26, while in the Seventh Circuit, courts must give those interpretations "substantial deference" akin to *Chevron* deference, Pet. 26-27.

Nor can the cases underlying the split be distinguished on their facts. Respondents attempt, for example, to distinguish the Fifth Circuit's *Access Telecom* case by arguing that the Mexican agency was not "authorized to interpret, rather than simply

enforce, Mexican law." Opp. 20. But the Second Circuit never held that the Chinese Commerce Ministry possesses the authority to interpret law within the Chinese legal system—instead, it recognized only that the Chinese Ministry is the "highest authority within the Chinese government authorized to regulate foreign trade." Opp. 20 (citing App. 6a).

Respondents assert that the Eleventh Circuit's *McNab* case "did not even concern the meaning of Honduran law," yet simultaneously admit that the "question in *McNab* was . . . whether Honduran regulations were valid during the relevant time period." Opp. 20). The *McNab* court conducted an independent analysis of Honduran law and refused to grant conclusive deference to the interpretation asserted in the Honduran government's amicus brief. Opp. 21. Respondents separately attempt to distinguish *McNab* on the grounds that Honduras had previously asserted a conflicting interpretation of the law at issue, but so too here: the Chinese government made contradictory representations to the U.S. government and the WTO regarding its purported de-regulation of the Chinese Vitamin C market in 2001. App. 74a.

Contrary to Respondent's assertion, Opp. 21, the D.C. Circuit's *McKesson* case clearly involved an interpretation of Iranian law. The *McKesson* court unambiguously rejected Iran's interpretation of the Treaty of Amity as construed under Iranian law. *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) ("We hold that the Treaty

of Amity, construed under Iranian law, provides McKesson with a private right of action . . . .").

In *Carranza*, the Sixth Circuit afforded no deference to El Salvador's amicus brief, which argued that a statement of extraterritorial application in the Salvadorean Amnesty Law would have been superfluous. Instead, the Sixth Circuit engaged in its own, independent interpretation of the Amnesty Law, which it held not to apply extraterritorially. Pet. 25.

Respondents attempt to harmonize the decision below with the Seventh Circuit's *In re Oil Spill* case by arguing that both decisions merely adopt a deference standard similar to what an administrative agency would receive under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). But the panel's conclusive deference standard and *Chevron* deference are different. For example, an administrative agency would not receive *Chevron* deference in this case, because *Chevron* does not apply to "informal agency actions" like agency amicus briefs. *Matz* v. *Household Int'l Tax Reduction Inv. Plan*, 388 F.3d 570, 573 (7th Cir. 2004). Further, deference is not warranted where an agency's interpretive position conflicts with a prior interpretation, appears to have been created for the purposes of litigation, or is merely a post-hoc rationalization—each of which the record showed here. Pet. 14; App. 88a, 120a; *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

The panel itself admitted that the District Court's "careful and thorough treatment of the evidence before it" would have been "entirely appropriate," but for the *sole* fact that the Chinese government filed an amicus brief in the litigation. App. 30a n.10. That standard amounts to conclusive deference to a foreign sovereign simply by virtue of appearance, which is plainly incompatible with the approaches in five other circuits. Pet. 24-27.

3. Respondents' merits defenses, Opp. 17-20, 24-27, do not counsel against certiorari. Even modest disagreement among the lower courts on the standard of deference owed to foreign sovereigns is intolerable; here, the need for review is urgent. Pet. 28-29.

Respondents point to *United States* v. *Pink*, 315 U.S. 203 (1942), but as evidenced by the disarray in the lower courts, Pet. 24-27, *Pink* has failed to provide clear guidance. *Pink* held only that the "official declaration" of a Russian body with "power to interpret existing Russian law," requested and received "through diplomatic channels" so as to clarify whether a particular Russian decree applied extraterritorially, would be treated as "conclusive so far as the intended extraterritorial effect" of that decree was concerned. *Pink*, 315 U.S. 203, 219-220 (1942). *Pink* was decided in an era in which foreign law was treated as a question of "fact," and offered no further guidance on how to treat foreign sovereign legal interpretations generally, including when the foreign sovereign appears as a litigant. And as the District Court noted, there is doubt whether *Pink* survived the promulgation of Rule 44.1, which assigns responsibility for

interpreting foreign law to the federal courts. App. 95a-96a, 180a-181a.

Respondents' merits defense at Opp. 17-19 only highlights the panel's errors. Two district court judges found compelling evidence to doubt Respondents' claim that the 2002 regime of "self-discipline" legally compelled Chinese companies to violate U.S. antitrust law. That evidence showed, *inter alia*, that the China declared that it had ceased administering Vitamin C exports at the end of 2001, App. 74a, that the Chamber eliminated the requirement that exporters be members of the Vitamin C Subcommittee in 2002, App. 132a-134a, and that the Chamber's own documents revealed that Vitamin C "verification and chop" requirements were not enforced by 2003. App. 149a. The Ministry was unable to explain (apart from conclusory declarations about the complexity of Chinese law) why a system of voluntary coordination, managed by a voluntary membership organization, which declined to impose any sanctions for deviations from purportedly-mandatory coordination, should be treated as "compulsory" for purposes of U.S. antitrust law.[1] Only conclusive deference, blind to any evidence outside the

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[1] Respondents misleadingly claim that Petitioners conceded that Chinese law compelled coordination. Opp. 17. That assertion relies upon an out-of-context quotation, as demonstrated by the surrounding text in the same brief, including: "this is a case of voluntary agreements where no outside compulsion from the Chamber happened." Dkt. 174 at 25-26, No. 13-4791 (2d Cir. Aug. 11, 2014).

four corners of the Ministry's brief, could permit such a conclusion.

Respondents assert that "Petitioners cannot point to any case where a foreign sovereign has subverted a U.S. tribunal by falsely asserting a conflict between its law and U.S. law or by manufacturing such a conflict for purposes of litigation," Opp. 25, but this case involves precisely that scenario. The record showed that the Chinese government collaborated with Respondents to manufacture a comity defense in order to shield Respondents from U.S. liability. App. 88a. The Second Circuit's rule of conclusive deference prevented it from considering that evidence, along with other evidence that contradicted China's submission. App. 74a, 95a, 97a.

C. This Court Should Clarify Whether Courts Have Discretion to Abstain from Otherwise Valid Sherman Act Jurisdiction over Foreign Conduct.

1. This Court should also grant review to decide whether federal courts have the discretion to decline jurisdiction over antitrust claims based on the case-by-case application of a multifactor balancing test. The question is important on its own merits, but is even more urgent if Respondents are correct that a comity-abstention defense may be adjudicated at any stage of the litigation, on any record that a court prefers, and even by a court *sua sponte*.

2. Prior to *Hartford Fire*, the circuits "were divided over whether they could abstain from exercising jurisdiction on a case-by-case basis as a matter of

international comity." Br. Amicus Curiae of William S. Dodge and Paul B. Stephan at 11. Since this Court reserved that question in *Hartford Fire*, the situation has not improved. Five circuits each employ five distinct versions of such a "balancing test," each considering anywhere from three-to-ten factors. App. 15a-16a (ten factors); *Montreal Trading Ltd.* v. *Amax Inc.*, 661 F.2d 864 (10th Cir. 1981) (five and six factors); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980) (three); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (ten); *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613-614 (9th Cir. 1976) (seven). Considering that this Court has never countenanced discretionary abstention from antitrust jurisdiction, it is puzzling to describe the *Timberlane* family of abstention doctrines as "settled law." Opp. 28. Far from "settled," the "comity balancing test" is a recent, amorphous, and anomalous abstention doctrine that conflicts with this Court's rejection of case-by-case abstention. Pet. 30-33.

Respondents are wrong to suggest that courts have "flexibility" to take or decline jurisdiction based solely upon a judge's prediction about the diplomatic consequences of litigation. Opp. 25. The Executive manages U.S. diplomacy, and Congress determines the scope of federal subject-matter jurisdiction, which courts "have a strict duty to exercise." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). The Second Circuit's "comity balancing test" is a judge-made end run around Congress's judgment that federal courts should exercise jurisdiction over claims that arise

under the Sherman Antitrust Act. 15 U.S.C. §§ 1, 6a, 15; 28 U.S.C. § 1331.

3. This Court has discretion to review questions "fairly included" within other questions presented, *Rumsfeld* v. *F.A.I.R., Inc.*, 547 U.S. 47, 56 (2006), and even to grant review of questions not squarely presented and litigated below, when a case is otherwise before the Court on § 1254 jurisdiction. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). There is therefore no obstacle to reviewing this question with the other questions presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL., PETITIONERS

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by reviewing a pretrial order denying a motion to dismiss in an appeal from a final judgment entered after a trial on the merits.

2. Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law.

3. Whether a district court may invoke principles of international comity to dismiss a private suit brought under the Sherman Act, 15 U.S.C. 1 *et seq.*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the second question presented.

STATEMENT

1. Petitioners are U.S. purchasers of vitamin C. Respondents are Chinese manufacturers and exporters of vitamin C. In 2005, petitioners filed suits alleging that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by fixing the prices and quantities of vitamin C exported to the United States. Petitioners alleged that the conspiracy was accomplished through a membership entity known as the China Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Pet. App. 2a, 4a-5a.

a. Respondents moved to dismiss the complaints. They did not deny that they had fixed the prices and quantities of vitamin C exports. Instead, they asserted that their actions had been required by Chinese law, and that petitioners' claims were therefore barred by the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity. Pet. App. 6a. The Ministry of Commerce of the People's Republic of China (Ministry) filed an amicus brief supporting respondents. *Ibid.*; see *id.* at 189a-223a. The Ministry represented that it was the authority within the Chinese government responsible for regulating foreign trade, *id.* at 190a; that the Chamber was a state-supervised entity authorized to regulate vitamin C exports, *id.* at 201a; and that the alleged conspiracy had been "a regulatory pricing regime mandated by the government of China," *id.* at 197a.

Petitioners disputed that account of Chinese law. They noted, for example, that the Chamber had publicly described the agreement on vitamin C prices and quantities as a "self-regulated agreement" that was adopted "voluntarily" and "without any government intervention." Pet. App. 173a-174a (emphases and citation omitted). Petitioners also submitted evidence acquired through limited discovery, which in their view showed that respondents had "voluntarily restricted export volume and fixed prices." *Id.* at 175a.

The district court denied respondents' motion to dismiss. Pet. App. 157a-188a. The court held that the Ministry's description of Chinese law was "entitled to substantial deference," but it declined to treat the Ministry's brief as "conclusive," in part because "the plain language of the documentary evidence submitted by [petitioners] contradict[ed] the Ministry's position." *Id.*

at 181a; see *id.* at 179a. The court concluded that the record was "too ambiguous to foreclose further inquiry into the voluntariness of [respondents'] actions." *Id.* at 186a.

b. After further discovery, respondents moved for summary judgment. Pet. App. 10a. The Ministry submitted a statement reiterating its position that Chinese law had compelled respondents' conduct. *Id.* at 97a n.24. Petitioners cited additional evidence supporting their contrary view, including documents in which China had represented to the World Trade Organization (WTO) that it "gave up export administration of . . . vitamin C" in 2002. *Id.* at 74a (citation omitted).

The district court denied respondents' motion for summary judgment. Pet. App. 54a-156a. The court concluded that, although a foreign government's characterization of its law warrants deference, it is not "entitled to absolute and conclusive deference." *Id.* at 97a. Here, the court "respectfully decline[d] to defer to the Ministry's interpretation." *Id.* at 117a. The court explained that the Ministry's submissions had "fail[ed] to address critical provisions of the [governing legal regime] that, on their face, undermine its interpretation." *Id.* at 119a; see *id.* at 97a & n.24. The court also noted that the Ministry's most recent statement did not cite legal authorities "to support its broad assertions" and read like a "carefully crafted and phrased litigation position" rather than a "straightforward explanation of Chinese law." *Id.* at 120a. And the court emphasized that the Ministry had "ma[de] no attempt to explain China's representations [to the WTO] that it gave up export administration of vitamin C." *Id.* at 121a.

The district court then held that Chinese law did not require respondents to fix the price and quantity of vitamin C exports. Pet. App. 122a-155a. *Inter alia*, the court concluded that exporters had the authority to suspend the legal regime that assertedly required them to adhere to agreed-upon prices. *Id.* at 123a-125a. The court also concluded that, even if Chinese law required respondents to agree on and adhere to minimum prices, it did not compel their agreement to limit quantities. *Id.* at 126a-127a. The court stated that the factual record reinforced its understanding, because there was no evidence that Chinese exporters had faced penalties for failing to adhere to agreed-upon quantities or for "failing to reach agreements in the first instance." *Id.* at 151a; see *id.* at 149a-151a.

c. The case was tried to a jury, which found that respondents had conspired to fix the price and limit the output of vitamin C. The district court entered judgment for petitioners, awarding $147 million in damages and permanently enjoining respondents from further violations of the Sherman Act. Pet. App. 11a.

2. The court of appeals reversed. Pet. App. 1a-38a. The court held that "the district court erred in denying [respondents'] motion to dismiss" based on comity, and it therefore declined to "address the subsequent stages of th[e] litigation." *Id.* at 2a & n.2.

The court of appeals explained that, "[t]o determine whether to abstain from asserting jurisdiction on comity grounds," a court hearing a Sherman Act suit should apply a "multi-factor balancing test" drawn from *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane*), and *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). Pet. App. 14a-15a. In this case, the court focused primarily

on the first factor, which asks whether there was a "true conflict" between U.S. and Chinese law. *Id.* at 18a.

The court of appeals concluded that the existence of a true conflict "hinges on the amount of deference" that is owed to the Ministry's characterization of Chinese law. Pet. App. 20a. The court acknowledged that there is "competing authority" on that question, and that some courts have declined to "accept such statements as conclusive." *Id.* at 20a-21a. But the court held that, when a foreign sovereign "directly participates in U.S. court proceedings" and offers an interpretation that is "reasonable under the circumstances," "a U.S. court is bound to defer." *Id.* at 25a. The court then held, based on the Ministry's submissions, that "Chinese law required [respondents] to engage in activities in China that constituted antitrust violations here in the United States." *Ibid.* The court limited itself to the analysis in the Ministry's brief and did not consider the apparently contradictory statements or other evidence identified by the district court. *Id.* at 27a-33a.

Having found a true conflict, the court of appeals stated that the remaining comity factors "clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction." Pet. App. 34a. *Inter alia*, the court noted that respondents are Chinese companies, that their conduct had occurred in China, and that (according to the Ministry) this suit had "negatively affected U.S.-China relations." *Id.* at 34a-35.

DISCUSSION

The petition for a writ of certiorari should be granted, limited to the second question presented. That question seeks review of the court of appeals' holding that the Ministry's brief conclusively established the content of Chinese law during the prior period of time

that is at issue in this case. A federal court determining foreign law should give substantial weight to a foreign government's characterization of its own law. But a submission from a foreign government need not be treated as conclusive in all circumstances, and it does not preclude the court from considering other relevant material. The court of appeals' contrary holding warrants further review because it departs from the decisions of other circuits on an important question of federal law.

Petitioners also contend that the court of appeals erred by reviewing the denial of respondents' motion to dismiss, and that courts may never dismiss Sherman Act claims based on considerations of comity. Those additional questions do not warrant this Court's review. They do not implicate any conflict among the circuits, and they were neither briefed below nor expressly addressed by the court of appeals.

I. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' HOLDING THAT THE MINISTRY'S AMICUS BRIEF CONCLUSIVELY ESTABLISHED THE CONTENT OF CHINESE LAW

A. A Foreign Government's Characterization Of Its Own Law Is Entitled To Substantial Weight, But It Is Not Conclusive

Federal Rule of Civil Procedure 44.1 was adopted in 1966 to establish an "effective procedure for raising and determining an issue concerning the law of a foreign country." Fed. R. Civ. P. 44.1 advisory committee's note (1966) (Adoption). The rule states that the determination of foreign law is a "question of law" for the court rather than a question of fact for the jury. Fed. R. Civ. P. 44.1. It further provides that, "[i]n determining foreign law, the court may consider any relevant

material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Ibid.*; see Fed. R. Crim. P. 26.1 (similar).

Rule 44.1 reflects a judgment that courts should have "maximum flexibility about the material to be considered and the methodology to be employed in determining foreign law in a particular case." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2444, at 349 (3d ed. 2008). Courts rely on a variety of materials, including "[s]tatutes, administrative material, and judicial decisions"; "expert testimony" interpreting those primary sources; and "any other information" that may be probative. *Id.* at 342-343; see, *e.g.*, *Bodum USA, Inc.* v. *La Cafetiere, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010).

Federal courts considering questions of foreign law are sometimes presented with the views of the relevant foreign government. The foreign government may be a party to the suit, see, *e.g.*, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (*Amoco Cadiz*), or (as in this case) it may express its views through an amicus brief or similar submission, Pet. App. 189a-223a; see, *e.g.*, *United States* v. *McNab*, 331 F.3d 1228, 1239-1240 & n.23 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). A federal court determining foreign law may also consider views that the relevant foreign government has expressed in another context. See, *e.g.*, *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), cert. denied, 531 U.S. 917 (2000).

A federal court should afford substantial weight to a foreign government's characterization of its own law. That weight reflects "the spirit of cooperation in which

a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987). It also makes practical sense. "Among the most logical sources for [a] court to look to in its determination of foreign law are the [relevant] foreign officials," who are familiar with the context and the nuances of the foreign legal system. *McNab*, 331 F.3d at 1241.

Federal courts should not, however, treat a foreign government's characterizations as conclusive in all circumstances. When "a foreign government changes its original position" or otherwise makes conflicting statements, a court is not bound to accept its most recent statement, or the one offered in litigation. *McNab*, 331 F.3d at 1241. A court likewise need not credit a statement that is unclear or unsupported, or that fails to address relevant authorities. See, *e.g.*, *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001) (*McKesson*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003). The precise weight to be given to a foreign government's statement turns on factors including the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence.[1]

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[1] In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (*Matsushita*), the United States suggested a more deferential approach, arguing that when a foreign government submits a statement characterizing its own law, federal courts "generally" must "accept that statement at face value." U.S. Amicus Br. at 23, *Matsushita*, *supra* (No. 83-2004). But the *Matsushita* brief clarified that courts are not bound to accept "[p]lainly ambiguous or

B. The Court Of Appeals Erred By Treating The Ministry's Amicus Brief As Conclusive And Disregarding Other Relevant Materials

1. The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings" and offers a characterization of its law that is "reasonable under the circumstances," the court "is bound to defer." Pet. App. 25a. That formulation would not necessarily be problematic if the qualifier "reasonable under the circumstances" allowed a court to assess the reasonableness of the foreign government's statements in light of *all* relevant circumstances. The totality of the court of appeals' opinion, however, indicates that it adopted and applied a far more deferential standard, under which a court is bound to accept a foreign government's characterization—and may not consider other material—unless that characterization is *facially* unreasonable.

Thus, the court of appeals disagreed with decisions holding that U.S. courts need not treat a foreign government's characterization as "conclusive." Pet. App. 21a. The court also stated that, if deference "is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation." *Id.* at 25a-26a. Most importantly, in concluding

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internally inconsistent statements," and it added that courts may look behind a foreign government's statement in "extraordinary circumstances." *Ibid.* More recently, in *McNab*, the United States endorsed what had by then become the courts of appeals' general practice of affording "substantial—but measured—deference to a foreign nation's representations." U.S. Br. in Opp. at 16-17, *McNab* v. *United States*, 540 U.S. 1177 (2004) (No. 03-622). That more nuanced approach is consistent with the position advocated here. To the extent the *Matsushita* brief suggested a different standard, it no longer reflects the views of the United States.

that the Ministry's brief was a "reasonable" characterization warranting deference, *id.* at 27a, the court limited its inquiry to the four corners of the brief and the sources cited therein, *id.* at 27a-29a.

The court of appeals thus did not acknowledge the Chamber's public statement that respondents had "voluntarily" agreed on prices and quantities "without any government intervention." Pet. App. 173a-174a (emphases and citation omitted). It also did not address the district court's conclusion that the Ministry's submissions "fail[ed] to address key provisions" of the governing legal regime. *Id.* at 119a; see *id.* at 97a & n.24. And because the court concluded that the Ministry's amicus brief precluded consideration of other material, it did not address the more extensive record developed at summary judgment, including, in particular, China's representation to the WTO that it had "g[i]ve[n] up export administration of ... vitamin C." *Id.* at 74a (citation omitted). Those circumstances are, at minimum, relevant to the weight that the Ministry's brief should receive. A standard that does not permit a court even to consider such information is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1.

2. The court of appeals believed that its rigid approach was compelled by *United States* v. *Pink*, 315 U.S. 203 (1942). Pet. App. 20a, 22a-23a. In *Pink*, which preceded the adoption of Rule 44.1, the United States had obtained an "official declaration by the Commissariat of Justice" of the Soviet Union defining the extraterritorial reach of a Russian decree. 315 U.S. at 218. The Court concluded that, because "the evidence supported [a] finding" that "the Commissariat for Justice ha[d]

power to interpret existing Russian law," the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Id.* at 220.

Because the Commissariat was empowered to render an authoritative construction of Russian law, the official declaration in *Pink* was in some respects analogous to a state supreme court's answer to a question of state law certified by a federal court. Cf. *United States* v. *Juvenile Male*, 560 U.S. 558, 561 (2010) (per curiam). There was also apparently no indication that the declaration was incomplete or inconsistent with the Soviet Union's past statements on the question. This Court's holding that the Commissariat's declaration was "conclusive" under those circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

3. The court of appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. That concern for reciprocity is sound, but it does not support the court's conclusion. When the Department of Justice litigates questions of U.S. law in foreign tribunals, it expects that its views will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the Department historically has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant material. And the Department is not aware of any foreign-court decision holding that

the Department's representations are entitled to such conclusive weight.[2]

C. The Court Of Appeals' Error Warrants Further Review

The degree of deference that a court owes to a foreign government's characterization of its own law is an important and recurring question, and foreign sovereigns considering making their views known to federal courts should understand the standards that will be applied to their submissions. The court of appeals' decision warrants further review because it departs from the decisions of other circuits and creates uncertainty about the proper treatment of foreign governments' characterizations of their laws.

The court of appeals acknowledged that there is "competing authority" on the question presented, and it expressly disagreed with the Seventh Circuit's decision in *Amoco Cadiz*. Pet. App. 20a-21a. Respondents observe (Br. in Opp. 23-24) that the court in *Amoco Cadiz* ultimately adopted the French government's interpretation of French law. The court did so, however, only because it found that interpretation "plausible" based

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[2] The understanding that a government's expressed view of its own law is entitled to substantial but not conclusive weight is consistent with two international treaties that establish mechanisms by which one state may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111 (similar). Although the United States is not a party to those treaties, they further confirm that the court of appeals' rule is out of step with international practice.

on all of the circumstances, including the French government's statements in other contexts. 954 F.2d at 1312. The Seventh Circuit did not treat the French government's submission as conclusive.

Other courts of appeals have rejected foreign governments' characterizations of their own laws even where, as here, those governments appeared in U.S. court. In *McNab*, for example, the Eleventh Circuit declined to accept "the Honduran government's current interpretation of its laws," as reflected in an amicus brief, because that interpretation was inconsistent with earlier statements by Honduran officials. 331 F.3d at 1242. And in *McKesson*, the D.C. Circuit rejected "Iran's contention that its corporate law requires shareholders * * * to physically appear at a company's office * * * in order to collect dividends." 271 F.3d at 1108. The D.C. Circuit declined to adopt that construction because it was not supported by the affidavits submitted by Iran's experts. *Id.* at 1108-1109. The approach reflected in those decisions is consistent with the role of federal courts under Rule 44.1, and inconsistent with the rule of conclusive deference that the Second Circuit applied in this case.

II. THIS COURT SHOULD DENY REVIEW OF PETITIONERS' CONTENTION THAT THE COURT OF APPEALS ERRED BY REVIEWING THE DENIAL OF RESPONDENTS' MOTION TO DISMISS

Petitioners contend (Pet. 19-22) that the court of appeals erred by reviewing the denial of respondents' motion to dismiss in an appeal from a judgment following a trial on the merits. Petitioners are correct that the denial of the motion to dismiss was effectively superseded when the district court revisited the comity issue later in the litigation. But the comity question was

properly before the court of appeals, and the court's unexplained decision to focus on the motion to dismiss does not appear to have affected its ultimate conclusion. That decision thus does not warrant this Court's review, particularly because the issue was not briefed below or expressly addressed by the court of appeals.

A. "The general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted). Accordingly, although most interlocutory orders are not themselves appealable, an "appeal from [a] final judgment opens the record and permits review of all rulings that led up to the judgment." 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3905.1, at 250 (2d ed. 1992).

In some circumstances, however, an interlocutory order is effectively superseded by subsequent developments in the district court. In *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), for example, this Court held that a court of appeals generally may not review "an order denying summary judgment after a full trial on the merits" because "the full record developed [at trial] supersedes the record existing at the time of the summary-judgment motion." *Id.* at 184. A defendant is still free to challenge the sufficiency of the plaintiff's proof, but that challenge "must be evaluated in light of the character and quality of the evidence received in court." *Ibid.*

In this case, respondents raised their comity defense in a motion to dismiss, a motion for summary judgment, and a motion for judgment as a matter of law under Rule 50(b). Pet. App. 41a & n.3. Each time, the district court rejected that defense based on a progressively

more developed record. Under the circumstances, the court of appeals erred in focusing on the "denial of [respondents'] motion to dismiss" and ignoring "the subsequent stages of th[e] litigation." *Id.* at 2a n.2. The district court ultimately decided the comity question based on a more complete record, which "supersede[d] the record existing at the time of the [motion to dismiss]." *Ortiz*, 562 U.S. at 184.

B. Although it was erroneous, the court of appeals' focus on the motion to dismiss does not appear to have affected the outcome below and would not likely affect any proceedings on remand. Because the court incorrectly believed that the Ministry's brief had to be accepted as conclusive, it declined to consider other material in the motion-to-dismiss record—a conclusion that would have applied equally to the more extensive record developed later. And if this Court grants review and holds that the Ministry's brief is not entitled to conclusive weight, the court of appeals can reconsider the foreign-law issue on remand in light of all of the pertinent record materials.[3]

Petitioners assert (Pet. 22) that the court of appeals' focus on the motion to dismiss was dispositive because "[r]espondents' failure to raise comity as a defense in their pre-verdict Rule 50(a) motion barred them from seeking relief on that ground in their post-verdict Rule 50(b) motion, and on any appeal." It is true that, absent a Rule 50(b) motion, "an appellate court is 'powerless' to review the sufficiency of the evidence after trial."

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[3] Indeed, the court of appeals stated that, but for the Ministry's brief, "the district court's careful and thorough treatment of the evidence before it * * * at both the motion to dismiss and summary judgment stages would have been entirely appropriate." Pet. App. 30a n.10.

Ortiz, 562 U.S. at 189 (citation omitted). It is also true that "[a] motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds" under Rule 50(a). *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 485 n.5 (2008). For two reasons, however, those principles did not preclude the court of appeals from deciding the comity question.

First, comity does not concern "the sufficiency of the evidence." *Ortiz*, 562 U.S. at 189. Both the determination of foreign law and the ultimate decision whether to dismiss a claim on comity grounds are made by the court, not the jury. Fed. R. Civ. P. 44.1; see Pet. App. 42a. Indeed, "given the important role that comity plays" in protecting interests that transcend the parties to a particular case, a court may overlook a party's failure to raise the issue. *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 138-140 (2d Cir. 2014).[4]

Second, petitioners have forfeited their Rule 50(a) argument. Petitioners did not object when respondents raised comity in their Rule 50(b) motion. D. Ct. Doc. 702, at 24-31 (May 10, 2013). Where, as here, "the nonmoving party fails to object to a Rule 50(b) motion on the grounds of waiver, the objection itself is deemed waived." *Gronowski* v. *Spencer*, 424 F.3d 285, 297 (2d Cir. 2005). And petitioners forfeited the argument again by failing to raise it on appeal. Pet. C.A. Br. 44-45.

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[4] Contrary to respondents' suggestion (Br. in Opp. 15), principles of international comity do not bear on the court's subject-matter jurisdiction. See *Cooper* v. *Tokyo Elec. Power Co.*, 860 F.3d 1193, 1209-1210 (9th Cir. 2017); cf. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514-516 (2006). Courts thus have the power, but not a jurisdictional obligation, to raise comity *sua sponte*.

C. The comity issue thus was properly before the court of appeals, even though the court erred by focusing on the motion to dismiss rather than on the full record. Petitioners assert (Pet. 19-20) that this aspect of the court of appeals' decision conflicts with decisions of the Fifth, Sixth, and Tenth Circuits holding that a court of appeals may not review the denial of a motion to dismiss after a trial on the merits. But those decisions involved motions to dismiss for failure to plead facts sufficient to state a claim, not motions based on international comity. And even if the court of appeals' decision created a circuit conflict, this case would not be an appropriate vehicle in which to resolve it because the issue was neither briefed below nor explicitly addressed by the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

III. PETITIONERS' CONTENTION THAT COURTS MAY NOT DISMISS SHERMAN ACT CLAIMS BASED ON INTERNATIONAL COMITY DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners contend (Pet. 29-34) that a federal court may never invoke principles of comity to dismiss a Sherman Act claim. Petitioners did not raise that argument below, and the court of appeals' implicit conclusion that comity-based dismissals are sometimes permissible does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

A. This Court has long held that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). In Section 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),

Pub. L. No. 97-290, Tit. IV, 96 Stat 1246 (15 U.S.C. 6a), Congress confirmed that understanding and clarified the application of the Sherman Act to conduct involving foreign commerce. Under the FTAIA, the Sherman Act generally does not reach "commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce" or "imports to the United States." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 161 (2004) (*Empagran*).

Comity is often described as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). The Sherman Act does not expressly incorporate principles of comity. But the comity doctrine had already been established when the Sherman Act was enacted, see, *e.g.*, *id.* at 165-166, and it thus formed a part of the "contemporary legal context in which Congress acted," *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 532 (1983). This Court has often looked to that context in "ascertain[ing] the intended scope" and application of the Sherman Act's broadly worded provisions. *Ibid.*

Consistent with that understanding, courts of appeals have long held that courts may, in unusual circumstances, dismiss private Sherman Act claims based on principles of comity. See, *e.g.*, *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-1298 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of Am.*, 549 F.2d 597, 613-615 (9th Cir. 1976). Those courts have considered a variety of factors, including:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane, 549 F.2d at 614; see *Mannington Mills*, 595 F.2d at 1297-1298 (similar ten-factor test). Congress did not disturb those decisions when it enacted the FTAIA. To the contrary, the House Report accompanying the FTAIA cited *Timberlane* and specified that the FTAIA "would have no effect on the courts' ability to employ notions of comity." H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982).

Comity-based dismissals should be rare, because Congress unambiguously intended the Sherman Act to reach foreign conduct and because federal courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). But in the United States' view, federal courts may, in extraordinary circumstances, dismiss private Sherman Act claims based on principles of comity.[5]

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[5] Although courts may engage in a comity analysis in private Sherman Act suits, they should not do so in actions brought by federal agencies. The government's decision to bring an enforcement action "represents a determination that the importance of antitrust

B. The United States does not endorse all aspects of the court of appeals' comity analysis. For example, under the circumstances presented here, respondents' argument that Chinese law required them to engage in the challenged conduct might have been better analyzed under the rubric of the foreign sovereign compulsion doctrine rather than through a comity analysis. Cf. U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* § 4.2.2, at 32-34 (2017). The court also gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust laws. Pet. App. 34a-35a. Conversely, the court gave too much weight to China's objections to this suit. *Id.* at 35a. Unlike a statement from the Executive Branch, a foreign sovereign's objection to a suit does not, in itself, necessarily indicate that the case will harm U.S. foreign relations. But petitioners do not seek this Court's review of the court of appeals' specific application of comity principles; they argue that the court should not have performed a comity analysis at all. That aspect of the court's decision does not conflict with any decision of this Court or another court of appeals.

1. In *Hartford Fire*, this Court declined to decide whether a court may dismiss a Sherman Act claim based on comity. 509 U.S. at 798. The Court has not explicitly

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enforcement outweighs any relevant foreign policy concerns." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* § 4.1, at 28 (2017). Given the primacy of the Executive Branch in the realm of foreign policy, courts should not "second-guess the executive branch's judgment as to the proper role of comity concerns" in antitrust enforcement actions. *United States* v. *Baker Hughes Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990).

revisited that issue in the intervening years, but petitioners assert (Pet. 31-32) that the Court implicitly foreclosed comity-based dismissals in *Empagran*. That is not correct. In *Empagran*, the Court considered the FTAIA's directive that the Sherman Act reaches conduct involving non-import foreign commerce only if the conduct's effect on U.S. commerce "gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2); see *Empagran*, 542 U.S. at 174. The Court held that, when a Sherman Act violation "adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect," a plaintiff who suffers only foreign harm may not sue. 542 U.S. at 164.

In reaching that conclusion, this Court rejected the plaintiffs' argument that courts should deal with the problems posed by foreign-injury cases by "abstaining where comity considerations so dictate." *Empagran*, 542 U.S. at 168. The Court deemed that approach "too complex," and instead interpreted the FTAIA to "exclude independent foreign injury cases *across the board*." *Ibid.* In so holding, however, the Court did not purport to resolve the question left open in *Hartford Fire* or to bar courts from invoking comity principles in cases that fall within the scope of the Sherman Act as clarified by the FTAIA.

2. Petitioners are also wrong in asserting (Pet. 32-33) that other courts of appeals have rejected the approach to comity reflected in *Timberlane* and *Mannington Mills*. To the contrary, one of the decisions they cite "commend[ed] the[] analysis" in those cases and agreed that "[a] district court should not apply the antitrust laws to foreign conduct or foreign actors if

such application would violate principles of comity." *Industrial Inv. Dev. Corp.* v. *Mitsui & Co.*, 671 F.2d 876, 884 & n.7 (5th Cir. 1982), vacated, 460 U.S. 1007 (1983). The remaining decisions on which petitioners rely simply interpreted the Sherman Act's extraterritorial reach; they did not address any case-specific comity arguments, much less hold that such arguments are categorically foreclosed. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-539 (8th Cir. 2007); *Empagran S.A.* v. *F. Hoffmann-Laroche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005), cert. denied, 546 U.S. 1092 (2006).

C. Even if the comity question otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. As petitioners acknowledge (Reply Br. 13), they did not argue below that comity-based dismissals are categorically impermissible, and the court of appeals therefore did not consider that argument. This Court's "traditional rule * * * precludes a grant of certiorari" where, as here, "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioners identify no sound reason to depart from that rule here.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the second question presented.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
Petitioners,

v.

HEBEI WELCOME,
PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS WILLIAM S. DODGE AND PAUL B. STEPHAN IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits.

2. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).

3. Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW Section 403 8

RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION (AM. LAW INST., Tentative Draft No. 2, 2016) 1, 4, 9, 15, 16

INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of Professors William S. Dodge and Paul B. Stephan.[1]

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[1] Pursuant to Rule 37.2(a), amici certify that counsel of record for the parties received timely notice of the intent to file this brief and have granted consent, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or its counsel made such a monetary contribution.

[2] Affiliations are listed for identification purposes only.

Law of the United States. He is the author of *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev. 17 (2014), among other publications.

Amici have academic expertise and a strong interest in the proper interpretation of U.S. law doctrines based on international comity.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari to address at least the third question presented: "Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury."[3] This is a question of exceptional importance on which the Second Circuit's decision conflicts with the decisions of this Court. The question has also divided the lower courts and has significant implications for other doctrines of U.S. law based on international comity.

Plaintiffs alleged that Defendants and their co-conspirators established a cartel to fix the prices of vitamin C exported to the United States in violation of Sherman Act § 1. App. 157a. Defendants moved to dismiss under the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity. App. 162a. The district court denied the motion to dismiss and, after further discovery, denied Defendants' motion for summary judgment. App. 56a. At trial, the jury found

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[3] Amici express no views on the other two questions presented.

Defendants liable for violating Section § 1 of the Sherman Act. The district court awarded Plaintiffs approximately $147 million in damages and permanently enjoined Defendants from further violations of the Sherman Act. App. 2a.

On appeal, the Second Circuit declined to address the act of state doctrine or the doctrine of foreign sovereign compulsion. App. 37a-38a. Instead, the court of appeals held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." App. 3a. The Second Circuit reached this conclusion by applying a "multi-factor balancing test," App. 14a-15a, developed and applied by several courts of appeals during the 1970s and 80s. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976).

The Second Circuit failed to honor this Court's instruction that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). This Court has recognized certain exceptions to this obligation, but none applies in this case.

In support of its multi-factor balancing test, the Second Circuit relied on this Court's refusal to reject international-comity abstention outright in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-99 (1993). *See* App. 17a. But the Second Circuit ignored this Court's subsequent rejection of case-by-case balancing as "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); *see also RJR Nabisco, Inc. v.*

European Community, 136 S. Ct. 2090, 2108 (2016) (refusing to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign"); *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 259 (2010) (criticizing the "methodology of balancing interests"). Lower courts are divided over whether they may abstain from exercising jurisdiction on a case-by-case basis as a matter of international comity.

The Second Circuit's discretionary abstention doctrine also threatens to supplant more narrowly tailored doctrines of international comity historically favored by this Court, such as the doctrine of foreign sovereign compulsion and the act of state doctrine. The doctrine of foreign sovereign compulsion requires that the defendant face severe sanctions for failing to comply with foreign law and has sought to avoid the conflict in good faith. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 222 (AM. LAW INST., Tentative Draft No. 2, 2016).[4] The Second Circuit expressly held, however, that neither requirement applied under its comity balancing test. App. 30a-33a. The act of state doctrine is limited to claims that would require the court to declare invalid the official act of a foreign sovereign. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The Second Circuit's discretionary abstention doctrine is not so limited. App. 31a. If the decision below is allowed to stand, the more specific doctrines this

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[4] Although amici serve as Co-Reporters for the Fourth Restatement, they file this brief in their individual capacities. This brief should not be taken to represent the views of the American Law Institute.

Court has developed to mediate relationships with foreign legal systems will increasingly find themselves replaced by a "vague doctrine of abstention," *Kirkpatrick*, 493 U.S. at 406, of the sort that this Court has consistently rejected.

Accordingly, this Court's plenary review is amply warranted.

ARGUMENT

I. THE SECOND CIRCUIT'S DISCRETIONARY ABSTENTION DOCTRINE CONFLICTS WITH THE DECISIONS OF THIS COURT

1. This Court has repeatedly emphasized that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quoting *Colorado River*); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (same); *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (same). This obligation is subject to certain exceptions. Federal courts may decline to hear a case "where the relief being sought is equitable in nature or otherwise discretionary," such as an action for declaratory judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996). In actions at law, federal courts may stay their proceedings in deference to other federal courts, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and may decline jurisdiction in favor of state courts under narrowly circumscribed abstention doctrines and in other "exceptional" circumstances. *Colorado River*, 424 U.S. at 818. Federal courts may also decline jurisdiction in favor of foreign courts under the doctrine of *forum non*

conveniens, provided that "there exists an alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

None of these exceptions to the federal courts' obligation to exercise jurisdiction applies in this case. Plaintiffs' Sherman Act claim was an action for damages, although the district court also granted injunctive relief. The Second Circuit did not order abstention in favor of another federal or state court. Defendants did not seek dismissal under the doctrine of *forum non conveniens*. Indeed, the Second Circuit conceded that "Plaintiffs may be unable to obtain a remedy for Sherman Act violations in another forum." App. 34a. The court of appeals' suggestion that "complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes," App. 34a-35a, ignores Plaintiffs' rights to seek compensation for antitrust injuries under federal law and the federal courts' obligations to decide those claims. As Justice Scalia noted, writing for a unanimous Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), "[t]he short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

2. It is clear that the district court had subject matter jurisdiction in this case and that Section 1 of the Sherman Act reached the Defendant's conduct that caused substantial anticompetitive effects in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to

foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.").

In the decision below, the Second Circuit nevertheless held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." App. 3a. To reach this conclusion, the Second Circuit relied on the "multi-factor balancing test," App. 14a-15a, developed by the courts of appeals in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). The Second Circuit distilled those cases into a ten-factor test, which it referred to as the "comity balancing test." App.15a-16a.[5] Applying those factors to the

[5] The ten factors are: "(1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted,

facts of this case, *see* App. 33a-37a, the Second Circuit concluded "that China's 'interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.'" App. 37a (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987)).

In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), the petitioners raised a similar argument, but this Court found it unnecessary to decide whether a federal court may decline to exercise jurisdiction "under the principle of international comity." *Id.* at 797. Because the petitioners in *Hartford* did not claim that compliance with both U.S. and foreign law was "impossible," this Court reasoned that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 799.[6] The Second Circuit read *Hartford*

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whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue." App. 15a-16a (citing *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 614).

[6] In *Hartford Fire*, Justice Scalia argued in dissent that customary international law requires a balancing of factors in each case to determine if the exercise of jurisdiction is reasonable, relying on Section 403 of the Restatement (Third) of Foreign Relations Law. *See*

Fire "narrowly," "as suggesting that the remaining factors in the comity balancing test are still relevant to an abstention analysis." App. 17a. In so doing, the Second Circuit ignored this Court's subsequent decisions, which have repeatedly disapproved a discretionary, case-by-case approach.

In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), an antitrust case governed by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, respondents argued that courts could take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Empagran*, 542 U.S. at 168. This Court rejected that argument, concluding that such a case-

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Hartford Fire, 509 U.S. at 818-19 (Scalia, J., dissenting). Amici submit that customary international law imposes no such obligation and that the question is rather one of international comity. The International Court of Justice has held that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*." *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 97, 122 (Feb. 3) (quoting *North Sea Continental Shelf (Germ. v. Den.; Germ. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20)). Other jurisdictions have not followed a practice of case-by-case balancing. *See, e.g.*, *A. Ahlström Osakeyhtiö v. Comm'n* (*"Wood Pulp"*), 1988 E.C.R. 5193, ¶¶ 19-23 (European Court of Justice). In the absence of settled state practice, no customary-international-law obligation can exist. For this reason, the Restatement (Fourth) of Foreign Relations Law concludes that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 211, Reporters' Note 3 (AM. LAW INST., Tentative Draft No. 2, 2016).

by-case approach was "too complex to prove workable." *Id.* As an example of this unworkable, balancing approach, the Court cited *Mannington Mills*, *see id.*, one of the two cases from which the Second Circuit drew its multi-factor test. *See* App. 15a. The FTAIA does not apply in the present case because the antitrust claims involve import commerce. *See* 15 U.S.C. § 6a (limiting FTAIA to cases involving trade or commerce "other than import trade or import commerce"). But there is no reason to believe that a case-by-case comity approach is any more workable in antitrust cases not mediated by the FTAIA.

This Court has rejected a case-by-case approach to determine the geographic scope of other statutes as well. Considering the scope of Securities Exchange Act § 10(b) in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), the Court criticized the lower courts' "methodology of balancing interests," *id.* at 259, which had led to "the unpredictable and inconsistent application of § 10(b) to transnational cases." *Id.* at 260. Instead, this Court adopted a "clear test" that simply asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70. Just last Term, in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), this Court considered the geographic scope of RICO, holding that two of its substantive provisions apply extraterritorially to the same extent as RICO's underlying predicate acts, *id.* at 2101-03, and that RICO's private right of action requires proof of domestic injury to business or property. *Id.* at 2111. The European Community asked this Court to consider the absence of international friction in cases where foreign

governments themselves were plaintiffs, but the Court refused to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign." *Id.* at 2108.

3. Before *Hartford Fire*, the courts of appeals were divided over whether they could abstain from exercising jurisdiction on a case-by-case basis as a matter of international comity. The Second, Third, and Ninth Circuits had embraced such discretionary authority, *see O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451-52 (2d Cir. 1987); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), while the Fifth and D.C. Circuits had rejected it. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-55 (D.C. Cir. 1984); *Indus. Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982), *cert. granted, vacated, and remanded on other grounds*, 460 U.S. 1007 (1983). In *Hartford Fire*, this Court expressly declined to resolve the circuit split. *See Hartford Fire*, 509 U.S. at 798 ("We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . , international comity would not counsel against exercising jurisdiction in the circumstances alleged here.").

Confusion has persisted in the lower courts since *Hartford Fire*. Like the Second Circuit in the decision below, the Ninth Circuit has continued to adhere to *Timberlane*. *See Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 846 n.5 (9th Cir. 1996) (concluding

that *Hartford Fire* "did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*."); *see also Mujica v. AirScan Inc.*, 771 F.3d 580, 600 (9th Cir. 2014) (concluding that *Hartford Fire* left unclear the application of international comity in other cases). Other Circuits, by contrast, have applied *Hartford Fire*'s effects test in antitrust cases without considering abstention on grounds of international comity. *See, e.g.*, *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438-39 (6th Cir. 2012); *United States v. Anderson*, 326 F.3d 1319, 1329-30 (11th Cir. 2003); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

4. Not only do the lower courts appear to be applying different approaches in different circuits, but the very nature of the Second Circuit's case-by-case approach invites inconsistency in the application of U.S. antitrust law. The Second Circuit identified ten different factors for district courts to weigh in each case, including the "[d]egree of conflict with foreign law or policy," the "[r]elative importance of the alleged violation of conduct here as compared with conduct abroad," and the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief." App. 15a-16a; *see supra* note 5 (listing all ten factors). The Second Circuit further held that a district court's decision whether to abstain on international comity grounds should be reviewed only for abuse of discretion. App. 12a. Although the court of appeals concluded in this case that "the factors clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction," App. 33a, reasonable minds may differ. Under the Second Circuit's comity balancing test, the application of U.S. antitrust law

will not turn simply on the existence of substantial intended effects in the United States, *see Hartford Fire*, 509 U.S. at 796, but also on the district judge's assessment of "foreign law or policy" and U.S. "foreign relations." As this Court repeatedly has observed, however, the judiciary generally lacks the capacity to undertake such assessments without guidance from the political branches. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (stating that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

II. THE SECOND CIRCUIT'S DISCRETIONARY ABSTENTION DOCTRINE THREATENS TO SUPPLANT MORE NARROWLY TAILORED DOCTRINES OF INTERNATIONAL COMITY

Rejection of the Second Circuit's "comity balancing test," App. 15a-16a, would not deprive the lower courts of the tools needed to manage interactions with foreign legal systems. In fact, U.S. law contains a wide range of doctrines to manage such interactions. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015). In this case, defendants invoked two such doctrines—the doctrine of foreign sovereign compulsion and the act of state doctrine. Each of these doctrines has specific requirements and limits, requirements and limits

that the Second Circuit's discretionary abstention doctrine would effectively render irrelevant.

1. This Court has recognized the doctrine of foreign sovereign compulsion in the context of U.S. court orders for the production of evidence. *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). *Rogers* held that dismissal of a complaint was too harsh a sanction for noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. This Court has not found it necessary to decide whether foreign sovereign compulsion is a valid defense to antitrust claims, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (noting that compliance with both U.S. and foreign law was not "impossible"); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986) ("Our decision makes it unnecessary to reach the sovereign compulsion issue."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (noting that there was "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing"), but lower courts have recognized the doctrine as a defense in antitrust cases. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970); *see also* Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation § 4.2.2 (2017) (recognizing foreign sovereign compulsion defense to antitrust claims).

Where courts have recognized the doctrine of foreign sovereign compulsion, they have generally imposed two requirements: (1) that "the person in question appears likely to suffer severe sanctions for failing to comply with foreign law"; and (2) that "the person in question has acted in good faith to avoid the conflict." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 222 (AM. LAW INST., Tentative Draft No. 2, 2016). With respect to the requirement of a severe sanction, this Court noted in *Rogers* that "that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Rogers*, 357 U.S. at 211; *see also Mannington Mills*, 595 F.2d at 1293 ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law."). With respect to the requirement of good faith, *Rogers* emphasized "petitioner's extensive efforts at compliance" showing that its noncompliance "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Rogers*, 357 U.S. at 211; *see also Interamerican*, 307 F. Supp. at 1304 (citing "uncontradicted evidence" that defendants "acted in good faith before and after the ban").

The Second Circuit's discretionary abstention doctrine would supplant the more narrowly tailored doctrine of foreign sovereign compulsion. Before abstaining on grounds of international comity, the court of appeals did not require a showing that the Defendants would be likely to suffer severe sanctions or even that the Defendant's conduct had been compelled. Instead, the court held that "[e]ven if Defendants' specific conduct was not compelled by

[Chinese law], that type of compulsion is not required" under the comity balancing test. App. 32a. Neither did the court of appeals require a showing that the Defendants had acted in good faith to avoid the conflict. Instead, the court held that "[w]hether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant" under the comity balancing test. App. 31a. By making dismissal of an antitrust claim as a matter of international comity available without a showing of either severe sanctions or good faith, the Second Circuit's abstention doctrine effectively makes the doctrine of foreign sovereign compulsion obsolete.

2. This Court has also recognized limits on the act of state doctrine. That doctrine provides that, "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of the official act of a foreign sovereign performed within its own territory." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 221(1) (AM. LAW INST., Tentative Draft No. 2, 2016). Most significantly for this case, this Court unanimously held in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), that the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). *Kirkpatrick* emphasized that "[t]he act of state doctrine is not some vague doctrine of abstention," *id.* at 406, and that "[c]ourts in the United States have the power, and ordinarily the

obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

The Second Circuit's comity balancing test is precisely the sort of "vague doctrine of abstention" that this Court rejected in *Kirkpatrick*. *Id.* at 406. Although the court of appeals did not reach Defendants' act of state defense, App. 37a-38a, the court did rely on one of its own pre-*Kirkpatrick* act of state decisions to support the comity balancing analysis. In considering the relevance of Defendants' conduct in establishing the Chinese export regime, the Second Circuit reasoned that "inquiring into the motives behind the Chinese Government's decision to regulate the vitamin C market in the way it did is barred by the act of state doctrine." App. 31a (citing *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987)). Under *Kirkpatrick*, however, the fact that a claim requires "imputing to foreign officials" even "an unlawful motivation," *Kirkpatrick*, 493 U.S. at 401, is not sufficient to invoke the act of state doctrine. Rather, the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). Under the Second Circuit's approach, the correct application of the act of state doctrine becomes irrelevant. Although the act of state doctrine is limited to claims that require a U.S. court to declare invalid the official act of a foreign sovereign, the Second Circuit's discretionary abstention doctrine is not.

* * *

At the end of its opinion, the Second Circuit noted: "Because we reverse and remand for dismissal on the basis of international comity, we do not address the act of state, foreign sovereign compulsion, or political question defenses." App. 37a-38a.[7] If the decision below is permitted to stand, this is likely to become an increasingly frequent disposition. Discretionary abstention as a matter of international comity may ultimately come to supplant the more narrowly tailored international-comity doctrines that this Court has developed.

The Second Circuit's comity balancing test invests district courts with essentially unreviewable discretion to dismiss federal claims without having to satisfy the more exacting requirements of the act of state doctrine and the doctrine of foreign state compulsion. It replaces these judicially administrable doctrines with case-by-case assessments of the "[d]egree of conflict with foreign law or policy" and the "[p]ossible effect upon foreign relations," App. 15a-16a, assessments that district judges are ill-suited to make.

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[7] If this Court grants the petition for certiorari and reverses, it should remand to allow the Second Circuit to address these defenses in the first instance.

CONCLUSION

For the reasons above, amici respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

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Dated: April 27, 2017

No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 3, 2017
CERTIORARI GRANTED JANUARY 12, 2018

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12/23/2013	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellants Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED. [1123554] [13-4791] [Entered: 12/30/2013 03:12 PM]
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1/15/2014	21	AMENDED NOTICE OF APPEAL, with copy of district court docket, on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED.[1135468] [13-4791] [Entered: 01/16/2014 10:25 AM]
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4/7/2014	98	PAGE PROOF BRIEF, on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED. Service date 04/07/2014 by CM/ECF. [1196447] [13-4791] [Entered: 04/07/2014 04:34 PM]
		* * *
4/14/2014	105	AMICUS BRIEF, on behalf of Amicus Curiae Ministry of Commerce of the People's Republic of China, FILED. Service date 04/14/2014 by CM/ECF. [1201317] [13-4791]--[Edited 04/16/2014 by KG] [Entered: 04/14/2014 12:53 PM]
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5/23/2014	111	MOTION, for judicial notice, on behalf of Amicus Curiae Ministry of Commerce of the People's Republic of China, FILED. Service date 05/23/2014 by CM/ECF. [1232707] [13-4791] [Entered: 05/23/2014 03:58 PM]
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7/28/2014 159 JOINT APPENDIX, volume 5 of 15, (pp. 1201-1500), on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED. Service date 07/28/2014 by CM/ECF.[1280894] [13-4791] [Entered: 07/28/2014 03:01 PM]

7/28/2014 160 JOINT APPENDIX, volume 6 of 15, (pp. 1501-1800), on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED. Service date 07/28/2014 by CM/ECF.[1280897] [13-4791] [Entered: 07/28/2014 03:02 PM]

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7/28/2014	166	JOINT APPENDIX, volume 12 of 15, (pp. 3301-3600), on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED. Service date 07/28/2014 by CM/ECF.[1280958] [13-4791] [Entered: 07/28/2014 03:27 PM]
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8/12/2014	179	SUPPLEMENTAL APPENDIX, on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, FILED. Service date 08/12/2014 by CM/ECF. [1292621] [13-4791] [Entered: 08/12/2014 10:47 AM]

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11/7/2014	202	MOTION ORDER, granting motion for oral argument [135] filed by Amicus Curiae Ministry of Commerce of the People's Republic of China, FILED. [1365538][202] [13-4791] [Entered: 11/07/2014 04:25 PM]

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12/2/2014	212	FRAP 28(j) LETTER, dated 12/02/2014, on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, RECEIVED. Service date 12/02/2014 by CM/ECF.[1382500] [13-4791] [Entered: 12/02/2014 02:09 PM]
12/4/2014	214	FRAP 28(j) LETTER, dated 12/04/2014, on behalf of Appellee Animal Science Products, Inc. and The Ranis Company, Inc., RECEIVED. Service date 12/04/2014 by CM/ECF.[1384983] [13-4791] [Entered: 12/04/2014 02:02 PM]

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8/21/2015	232	FRAP 28(j) LETTER, dated 08/21/2015, on behalf of Appellee Animal Science Products, Inc. and The Ranis Company, Inc., RECEIVED. Service date 08/21/2015 by CM/ECF.[1582596] [13-4791] [Entered: 08/21/2015 06:52 PM]

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8/24/2015	236	FRAP 28(j) LETTER, dated 08/24/2015, on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, RECEIVED. Service date 08/24/2015 by CM/ECF.[1583567] [13-4791] [Entered: 08/24/2015 05:45 PM]

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1/5/2016	240	FRAP 28(j) LETTER, dated 01/05/2016, on behalf of Appellant Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, RECEIVED. Service date 01/05/2016 by CM/ECF.[1676495] [13-4791] [Entered: 01/05/2016 02:40 PM]

1/6/2016	242	FRAP 28(j) LETTER, dated 01/06/2016, on behalf of Appellee Animal Science Products, Inc. and The Ranis Company, Inc., RECEIVED. Service date 01/06/2016 by CM/ECF.[1677273] [13-4791] [Entered: 01/06/2016 11:20 AM]
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9/20/2016	247	OPINION, vacating the district court's judgment entered November 27, 2013, reversing the order of November 11, 2008 and remanding with instructions to dismiss Plaintiffs' complaint with prejudice, by JAC, RCW, PWH, FILED.[1866427] [13-4791] [Entered: 09/20/2016 10:15 AM]
9/20/2016	249	CERTIFIED ORDER, dated 09/20/2016, to EDNY (BROOKLYN), ISSUED.[1866434] [13-4791] [Entered: 09/20/2016 10:18 AM]
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9/20/2016	253	JUDGMENT, FILED.[1866914] [13-4791] [Entered: 09/20/2016 03:07 PM]
		* * *
10/4/2016	255	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellee Animal Science Products, Inc. and The Ranis Company, Inc., FILED. Service date 10/04/2016 by CM/ECF.[1877303] [13-4791] [Entered: 10/04/2016 05:10 PM]

11/4/2016	259	ORDER, petition for rehearing en banc denied, FILED.[1900649] [13-4791] [Entered: 11/04/2016 01:36 PM]
11/14/2016	261	JUDGMENT MANDATE, ISSUED. [1905900] [13-4791] [Entered: 11/14/2016 01:51 PM]

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1/10/2017	267	U.S. SUPREME COURT NOTICE, granting Appellee Animal Science Products, Inc. extension to file Writ of Certiorari, FILED.[1944646] [13-4791] [Entered: 01/10/2017 04:51 PM]

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4/13/2017	269	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 04/12/2017, U.S. Supreme Court docket # 16-1220, RECEIVED.[2011246] [13-4791] [Entered: 04/13/2017 04:12 PM]
1/12/2018	270	U.S. SUPREME COURT NOTICE, dated 01/12/2018, U.S. Supreme Court docket # 16-1220, stating the petition for writ of certiorari is granted, RECEIVED.[2214448] [13-4791] [Entered: 01/16/2018 04:34 PM]

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT EASTERN DISTRICT OF NEW YORK (BROOKLYN) CIVIL DOCKET FOR CASE #: 1:06-MD-01738-BMC-JO

Date Filed	#	Docket Text
2/15/2006	1	Letter dated February 14, 2006 from the MDL Panel, enclosing a copy of the Panels Transfer Order consolidating this MDL action in EDNY, and assigning it to Judge Trager. (Attachments: # 1 MDL Transfer Order)Associated Cases: 1:06-md-01738-DGT-RML,1:05-cv-00453-DGT-RML,1:05-cv-06059-DGT-RML,1:06-cv-00149-DGT-RML(Brown, Marc) (Entered: 02/22/2006)
		* * *
3/8/2006		NOTICE - This matter is being reassigned from Magistrate Judge Robert M. Levy to Magistrate Judge James Orenstein for pretrial supervision.Associated Cases: 1:06-md-01738-DGT-RML,1:05-cv-00453-DGT-RML,1:05-cv-06059-DGT-RML,1:06-cv-00149-DGT-RML(Marino, Janine) (Entered: 03/08/2006)
		* * *
5/3/2006	11	Minute Entry for proceedings held before James Orenstein : Initial Conference Hearing held on 5/3/2006.

SCHEDULING: The next status conference will be held on June 14, 2006, at 2:00 p.m. THE FOLLOWING RULINGS WERE MADE: (1) The parties will submit simultaneous letters on May 12, 2006, regarding the authority for a stay of all discovery pending the resolution of anticipated motions for dismissal. The defendants' submission will also include objections or proposed alternative deadlines in the event discovery is not stayed. (2) The issue of the timing of the defendants' answers was not addressed at today's conference. The parties' counsel are directed to meet and confer and make either a joint proposal, or competing proposals for the deadline for each defendant to answer. In the absence of agreement, the parties should address whether there is any reason to extend any properly served defendant's deadline for answering past May 23, 2006. (3) I will enter a separate pretrial order governing other aspects of pretrial procedures as discussed at today's conference. (4) The law firm of Sidley Austin LLP, by attorney Joel M. Mitnick, was permitted to appear on behalf of the Ministry of Commerce of the People's Republic of China as *amicus curiae*

for purposes of today's conference. I thank Mr. Mitnick and his client for their participation and assistance, and look forward to their continued participation and assistance as the parties and the court grapple with the practical discovery and litigation challenges that may arise in this historic case. Accordingly, *amicus* is invited to appear through counsel at all future conferences before me in this litigation, and need not secure permission to do so in advance. To the extent *amicus* wishes to be heard with respect to the anticipated dispositive motions or other matters before Judge Trager, counsel must seek the court's permission. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00988-DGT-RML(Orenstein, James) (Entered: 05/03/2006)

5/4/2006	12	PRETRIAL ORDER 1: The attached order consolidates cases for pretrial purposes and provides instructions regarding attorney admissions and electronic filing. (SEE ATTACHED ORDER.) Signed by Judge James Orenstein on 05/04/06. Associated Cases: 1:06-md-01738-DGT-JO,1:05-

cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00988-DGT-RML(Adams-Ciardullo, Diana) (Entered: 05/04/2006)

* * *

6/7/2006 24 PRETRIAL ORDER 2 -- The attached Order sets forth dates for discovery deadlines and court appearances and appoints Co-Lead and Liaison Plaintiffs' Counsel. **SEE ATTACHED ORDER**. Signed by Judge James Orenstein on 06/07/06. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO(Adams-Ciardullo, Diana) (Entered: 06/07/2006)

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6/29/2006 30 MOTION for Leave to File Amicus Curiae Brief in Support of Defendants' Motion to Dismiss by Ministry of Commerce for the Peoples Republic of China. (Attachments: # 1 Exhibit A# 2 Exhibit B)Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO(Mitnick, Joel) (Entered: 06/29/2006)

6/29/2006	31	Letter to *Judge Trager, re: application to file Amicus Brief* by Ministry of Commerce for the Peoples Republic of China. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO(Mitnick, Joel) (Entered: 06/29/2006)
6/29/2006	32	CERTIFICATE OF SERVICE by Ministry of Commerce for the Peoples Republic of China re 30 MOTION for Leave to File *Amicus Curiae Brief in Support of Defendants' Motion to Dismiss* Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO(Mitnick, Joel) (Entered: 06/29/2006)
		* * *
6/30/2006	34	Letter *enclosing Notice of Motion to Dismiss and supporting papers (cover letter only, without enclosures pursuant to Judge Trager's Motion Practices)* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-

JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO(Goldstein, Richard) (Entered: 06/30/2006)

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7/6/2006	35	ORDER granting 30 Motion for Leave to File amicus brief. (Order endorsed on proposed order attached to motion.) Ordered by Judge David G. Trager on 7/6/2006. (Trager, David) (Entered: 07/06/2006)

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8/16/2006	45	REPLY in Opposition *Defendants' Motion to Dismiss or Strike Ranis's Claims for Damages* by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Affidavit of William Isaacson) Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Rutherford, Alanna) (Entered: 08/16/2006)
8/16/2006	46	MEMORANDUM in Opposition to Defendants' Motion to Dismiss by all plaintiffs. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4

Exhibit D# 5 Exhibit E# 6 Exhibit F # 7 Exhibit G # 8 Exhibit H # 9 Exhibit I # 10 Exhibit J # 11 Exhibit K # 12 Exhibit L # 13 Exhibit M) Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Rutherford, Alanna) (Entered: 08/16/2006)

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9/22/2006	66	Notice of MOTION to Dismiss *the Complaint with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6)* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)
9/22/2006	67	MOTION to Dismiss *(Defendants' Memorandum in Support of Motion to Dismiss)* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-

JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)

9/22/2006 68 MOTION to Dismiss *(Declaration of Richard S. Goldstein in Support of Defendants' Motion to Dismiss)* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 (part 1 of 3) # 4 Exhibit 3 (part 2 of 3) # 5 Exhibit 3 (part 3 of 3) # 6 Exhibit 4 # 7 Exhibit 5 (part 1 of 6) # 8 Exhibit 5 (part 2 of 6) # 9 Exhibit 5 (part 3 of 6) # 10 Exhibit 5 (part 4 of 6) # 11 Exhibit 5 (part 5 of 6) # 12 Exhibit 5 (part 6 of 6) # 13 Exhibit 6 # 14 Exhibit 7 # 15 Exhibit 8)Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)

9/22/2006 69 MOTION to Dismiss *(Brief of Amicus Curiae the Ministry of Commerce of the People's Republic of China in Support of the Defendants' Motion to Dismiss the Complaint)* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-

453. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)

9/22/2006 70 MOTION to Dismiss *(Declaration of Joel M. Mitnick in Support of the Brief of Amicus Curiae the Ministry of Commerce of the People's Republic of China)* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G # 8 Exhibit H # 9 Exhibit I # 10 Exhibit J # 11 Exhibit K)Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)

9/22/2006 71 RESPONSE in Opposition re 67 MOTION to Dismiss *(Defendants' Memorandum in Support of Motion to Dismiss) (Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss)* filed by Defendant(s) in

Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G # 8 Exhibit H # 9 Exhibit I # 10 Exhibit J # 11 Exhibit K # 12 Exhibit L # 13 Exhibit M) Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)

9/22/2006 72 REPLY to Response to Motion re 67 MOTION to Dismiss *(Defendants' Memorandum in Support of Motion to Dismiss) (Defendants' Reply Memorandum in Support of Motion to Dismiss)* filed by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. Associated Cases: 1:06-md-01738-DGT-JO,1:05-cv-00453-DGT-JO,1:05-cv-06059-DGT-JO,1:06-cv-00149-DGT-JO, 1:06-cv-00987-DGT-JO,1:06-cv-00988-DGT-JO,1:06-cv-01721-DGT-JO,1:06-cv-03528-DGT(Goldstein, Richard) (Entered: 09/22/2006)

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1/31/2007 124 AMENDED COMPLAINT against all defendants, filed by all plaintiffs.

(Rutherford, Alanna) (Entered: 01/31/2007)

* * *

5/31/2007	144	Letter *to Honorable Judge David G. Trager* by Ministry of Commerce for the Peoples Republic of China (Attachments: # 1 Un signed Order) Associated Cases: 1:06-md-01738-DGT-JO et al. (Mitnick, Joel) (Entered: 05/31/2007)
6/1/2007	145	Letter *responding to Ministry of Commerce's letter motion to appear at oral argument* by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453 (Rutherford, Alanna) (Entered: 06/01/2007)

* * *

8/10/2007	170	Letter dated 8/10/2007 from Joel M. Mitnick, Counsel for Amicus The Ministry of Commerce of the People's Republic of China to judge David G. Trager. (Attachments: # 1 Certificate of Replacement Copies # 2 Certificate of Replacement Copies) (Marziliano, August) (Entered: 08/10/2007)
8/20/2007	171	AMENDED COMPLAINT and Motion to File the Amended Complaint against all defendants, filed by all plaintiffs. (Attachments: # 1 Affidavit # 2 Exhibit Amended Complaint) (Rutherford, Alanna) (Entered: 08/20/2007)

* * *

9/25/2007	176	ORDER granting 171 letter motion to file a Second Amended Complaint. The court is inclined to grant a reasonable extension of the schedule to accommodate the issues raised by defendants, but refers the issue of scheduling to Magistrate Judge James Orenstein. Ordered by Judge David G. Trager on 9/25/2007. (Martinez, Mira) (Entered: 09/25/2007)

* * *

9/27/2007	179	AMENDED COMPLAINT *Second Amended Class Action Complaint. Document number 177 was filed in error* against Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453, filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Rutherford, Alanna) (Entered: 09/27/2007)

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1/22/2008	236	Letter by Ministry of Commerce for the Peoples Republic of China (Mitnick, Joel) (Entered: 01/22/2008)

* * *

2/4/2008	241	Letter *to Magistrate Judge Orenstein* by Ministry of Commerce for the Peoples Republic of China Associated Cases: 1:06-md-01738-DGT-JO et al. (Mitnick, Joel) (Entered: 02/04/2008)

* * *

2/8/2008	242	MOTION to Certify Class *(Injunction Class)* by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Rutherford, Alanna) (Entered: 02/08/2008)
2/8/2008	243	MEMORANDUM in Support re 242 MOTION to Certify Class (Injunction Class) filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J) (Rutherford, Alanna) (Entered: 02/08/2008)
2/8/2008	244	REPLY in Support re 242 MOTION to Certify Class *(Injunction Class)* filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Rutherford, Alanna) (Entered: 02/08/2008)

* * *

2/8/2008	246	MOTION to Certify Class *(Damages Class)* by Plaintiff(s) in Civil Action Philion vs Hebei Welcome Pharmaceutical Co. Ltd. 06-CV-987. (Rutherford, Alanna) (Entered: 02/08/2008)
2/8/2008	247	MOTION to Certify Class *(Damages Class)* by Plaintiff(s) in Civil Action

Animal Science vs Hebei, 05-CV-453. (Rutherford, Alanna) (Entered: 02/08/2008)

2/8/2008 248 MEMORANDUM in Support re 247 MOTION to Certify Class *(Damages Class)* filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J) (Rutherford, Alanna) (Entered: 02/08/2008)

2/8/2008 249 MEMORANDUM in Support re 247 MOTION to Certify Class *(Damages Class)* Supplemental filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Rutherford, Alanna) (Entered: 02/08/2008)

* * *

6/9/2008 306 Letter *to Honorable. David G. Trager* by Ministry of Commerce for the Peoples Republic of China (Attachments: # 1 Attachment I, # 2 Attachment II) (Mitnick, Joel) (Entered: 06/09/2008)

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8/26/2008 319 Letter *from Joel M. Mitnick Counsel for* by Ministry of Commerce for the Peoples Republic of China (Mitnick, Joel) (Entered: 08/26/2008)

* * *

8/29/2008	322	Letter *from J. Mitnick* by Ministry of Commerce for the Peoples Republic of China (Mitnick, Joel) (Entered: 08/29/2008)

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9/29/2008	331	Letter by Ministry of Commerce for the Peoples Republic of China (Mitnick, Joel) (Entered: 09/29/2008)

* * *

11/06/2008	338	MEMORANDUM AND ORDER denying defendants' motion to dismiss the complaints under the act of state doctrine, foreign sovereign compulsion and international comity. Defendants' motions to dismiss the second amended complaint are granted. Plaintiffs have 30 days to replead the second amended complaint to make allegations against JSPC and Legend. Ordered by Senior Judge David G. Trager on 11/6/2008. (Trager, David) (Entered: 11/06/2008)

* * *

12/2/2008	355	AMENDED COMPLAINT *Third Amended Class Action Complaint* against all defendants, filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Letter to Judge Trager, # 2 Comparison of Second and Third Amended Complaints)

(Rutherford, Alanna) (Entered: 12/02/2008)

* * *

1/30/2009 364 *Defendant Hebei Welcome Pharmaceutical Co. Ltd.'s* ANSWER to 355 Amended Complaint, by Hebei Welcome Pharmaceutical Co. Ltd.. (Critchlow, Charles) (Entered: 01/30/2009)

* * *

3/27/2009 371 Fully Briefed MOTION to Dismiss for Lack of Jurisdiction *Cover Letter to Honorable Judge Trager Enclosing Motion Papers Filed Under Seal by Defendants North China Pharmaceutical Group Corp., North China Pharmaceutical Co., Ltd., and North China Pharmaceutical Group International Trade Co., Ltd. (f/k/a North China Pharmaceutical Group Import and Export Trade Co., Ltd.),* by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Prescott, Darrell) (Entered: 03/27/2009)

3/30/2009 372 MOTION to Dismiss by North China Pharmaceutical Group, et al. Memorandum in support of motion to dismiss. Plaintiff's opposition to motion to dismiss. Declaration

of support of plaintiff's opposition. Reply memo in support of North China Pharmaceutical. Declaration of Christopher Chin. Documents filed under seal and placed in vault. (Siegfried, Evan) (Entered: 03/30/2009)

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11/23/2009 391 MOTION for Summary Judgment by Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Goldstein, Richard) (Entered: 11/23/2009)

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11/23/2009 393 MEMORANDUM in Support re 391 MOTION for Summary Judgment *or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P.* filed by Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Goldstein, Richard) (Entered: 11/23/2009)

11/23/2009 394 AFFIDAVIT/DECLARATION in Support re 391 MOTION for Summary

Judgment *or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P.* filed by Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Attachments: # 1 Exhibits 1-5, # 2 Exhibits 6-12, # 3 Exhibits 13-22, # 4 Exhibits 23-39, # 5 Exhibits 40-44, # 6 Exhibits 45-48, # 7 Exhibit 49, # 8 Exhibits 50-52, # 9 Exhibits 53-59) (Goldstein, Richard) (Additional attachment(s) added on 11/30/2009: # 10 Exhibit 35) (Marziliano, August). (Entered: 11/23/2009)

11/23/2009 395 MEMORANDUM in Opposition re 391 MOTION for Summary Judgment *or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P.* filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Goldstein, Richard) (Entered: 11/23/2009)

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11/23/2009 397 AFFIDAVIT/DECLARATION in Opposition re 391 MOTION for Summary Judgment *or, in the*

Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P. filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibits C-G, # 4 Exhibit H, # 5 Exhibit I, # 6 Exhibits J-M, # 7 Exhibit N (Part 1 of 2), # 8 Exhibit N (Part 2 of 2), # 9 Exhibits O-R, # 10 Exhibits S-U, # 11 Exhibits V-X, # 12 Exhibits Y-CC, # 13 Exhibits DD-II, # 14 Exhibit JJ, # 15 Exhibits KK-MM, # 16 Exhibits NN-RR, # 17 Exhibits SS-VV, # 18 Exhibits WW-YY, # 19 Exhibit 21, # 20 Exhibits 37,38,40,42, # 21 Exhibits 43,47,49, # 22 Exhibits 50,51,52,53,54,56, # 23 Exhibits 57,58,59,61,64, # 24 Exhibits 65,72,74, # 25 Exhibits 76,79,81,83, # 26 Exhibits 85,86,87,88,92, # 27 Exhibits 111,119,135, # 28 Exhibits 136,137,138,139, # 29 Exhibits 141,142, # 30 Exhibits 144,149,150, # 31 Exhibits 154,159,160,162,164,176,233) (Goldstein, Richard) (Additional attachment(s) added on 11/30/2009: # 32 Exhibit B, # 33 Exhibit E, # 34 Exhibit F, # 35 Errata H) (Marziliano, August). (Additional attachment(s) added on 11/30/2009: # 36 Exhibit 56, # 37 Errata 59 61 and 64, # 38 Exhibit

65 and 74, # 39 76 79 81 and 83, # 40 Exhibit 85 86 and 88, # 41 Exhibit 11 119 and 135, # 42 136 137 138 and 139, # 43 Exhibit 141, # 44 Exhibit 149 and 150, # 45 Exhibit 176) (Marziliano, August). (Entered: 11/23/2009)

11/23/2009 398 REPLY in Support re 391 MOTION for Summary Judgment *or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P.* filed by Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Goldstein, Richard) (Entered: 11/23/2009)

11/23/2009 399 AFFIDAVIT/DECLARATION in Support re 391 MOTION for Summary Judgment *or, in the Alternative, for Determination of Foreign Law and Entry of Judgment Pursuant to Rule 44.1, Fed. R. Civ. P.* filed by Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7

Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12) (Goldstein, Richard) (Entered: 11/23/2009)

11/23/2009 400 Letter *from Richard S. Goldstein to the Honorable David G. Trager* by Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd. (Attachments: # 1 Statement Of The Ministry Of Commerce of the PRC, dated 8/31/09) (Goldstein, Richard) (Entered: 11/23/2009)

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1/19/2010 416 REPLY in Opposition re 391 MOTION for Summary Judgment *(sur-reply permitted by D.E. 415)* filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Agrawal, Suyash) (Entered: 01/19/2010)

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2/5/2010 419 REPLY in Opposition re 391 MOTION for Summary Judgment */Defendants' Response To Plaintiffs' Sur-Reply Opposing Summary Judgment And Determination Of Foreign Law (Response to D.E. 416)* filed by Aland (Jiangsu) Nutraceutical Co.,

		Ltd. (Goldstein, Richard) (Entered: 02/05/2010)
		* * *
1/19/2011	423	JPMDL Order reassigning litigation to the Honorable Brian Cogan. Associated Cases: 1:06-md-01738-DGT-JO et al. (Marziliano, August) (Entered: 01/19/2011)
1/19/2011		Judge Brian M. Cogan added. Senior Judge David G. Trager no longer assigned to case. Associated Cases: 1:06-md-01738-DGT-JO et al. (Marziliano, August) (Entered: 01/19/2011)
		* * *
9/6/2011	440	ORDER denying 391 Motion for Summary Judgment. Ordered by Judge Brian M. Cogan on 9/1/2011. (Marziliano, August) (Entered: 09/06/2011)
		* * *
11/11/2011	445	MOTION for Leave to Appeal by Aland (Jiangsu) Nutraceutical Co., Ltd, Hebei Welcome Pharmaceutical Co. Ltd., JSPC America, Inc., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Attachments: # 1 Memorandum in Support Of Defendants' Motion For

Certification Of The Court's September 1, 2011 Order For Interlocutory Appeal Pursuant To 28 U.S.C. § 1292(b)) (Bomse, Stephen) (Entered: 11/11/2011)

* * *

11/30/2011 448 MEMORANDUM in Opposition re 445 MOTION for Leave to Appeal filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Affidavit of Service) (Landau, Brent) (Entered: 11/30/2011)

* * *

12/12/2011 450 REPLY in Support re 445 MOTION for Leave to Appeal filed by Aland (Jiangsu) Nutraceutical Co., Ltd, Hebei Welcome Pharmaceutical Co. Ltd., JSPC America, Inc., Northeast Pharmaceutical Group Co., Ltd., Shijiazhuang Pharma. Weisheng Pharmaceutical Co., Ltd.. (Bomse, Stephen) (Entered: 12/12/2011)

12/12/2011 451 Letter *Dated December 12, 2012 from Joel M. Mitnick to Judge Cogan* by Ministry of Commerce for the Peoples Republic of China (Mitnick, Joel) (Entered: 12/12/2011)

* * *

1/26/2012 453 **MEMORANDUM DECISION AND ORDER** denying 63 Motion to Dismiss; granting 242 Motion to Certify Class;

granting 247 Motion to Certify Class. Ordered by Judge Brian M. Cogan on 1/25/2012. (Siegfried, Evan) (Entered: 01/26/2012)

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2/9/2012 455 **MEMORANDUM DECISION AND ORDER** denying 445 Motion for Leave to Appeal. Ordered by Judge Brian M. Cogan on 2/8/2012. (Siegfried, Evan) (Entered: 02/09/2012)

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2/9/2012 457 Letter *to Magistrate Judge James Orenstein dated 2/9/2012* by Ministry of Commerce for the Peoples Republic of China (Mitnick, Joel) (Entered: 02/09/2012)

2/9/2012 458 DECLARATION re Order, *dated 02/06/2012* by Ministry of Commerce for the Peoples Republic of China (Attachments: # 1 Appendix A (Redacted in Full), # 2 Appendix B (Redacted in Full)) (Mitnick, Joel) (Entered: 02/09/2012)

* * *

3/30/2012 463 Letter *to Judge James Orenstein with Declaration of Joel M. Mitnick attached*, by Ministry of Commerce for the Peoples Republic of China (Attachments: # 1 Declaration Declaration of Joel M. Mitnick) (Mitnick, Joel) (Entered: 03/30/2012)

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8/8/2012	496	**MEMORANDUM DECISION AND ORDER**. The NCPC defendants' 371 motion to dismiss is granted in part and denied in part. Defendants North China Pharmaceutical Co. Limited and North China Pharmaceutical Group International Trade Co., Ltd. are dismissed from this case for lack of personal jurisdiction. The motion to dismiss is denied insofar as it seeks dismissal of defendant North China Pharmaceutical Group Corp. See attached order for further details. Ordered by Judge Brian M. Cogan on 8/7/2012. Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Siegfried, Evan) (Entered: 08/08/2012)

* * *

8/22/2012	505	ANSWER to 355 Amended Complaint, by North China Pharmaceutical Group Corp.. (Prescott, Darrell) (Entered: 08/22/2012)

* * *

11/12/2012	587	MOTION for Summary Judgment (Responses due by 12/3/2012) by North China Pharmaceutical Group Corp.. (Attachments: # 1 Memorandum in Support, # 2 Rule 56.1 Statement, # 3 Declaration of James D. Bailey, # 4

Exhibit A, # 5 Exhibit B, # 6 Exhibit C, # 7 Exhibit D, # 8 Exhibit E, # 9 Exhibit F, # 10 Exhibit G, # 11 Exhibit H, # 12 Exhibit I, # 13 Exhibit J, # 14 Exhibit K, # 15 Exhibit L, # 16 Exhibit M, # 17 Exhibit N, # 18 Exhibit O, # 19 Exhibit P) (Prescott, Darrell) (Entered: 11/12/2012)

* * *

12/3/2012 616 MEMORANDUM in Opposition re 587 MOTION for Summary Judgment filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Southwick, James) (Entered: 12/03/2012)

* * *

12/10/2012 621 REPLY in Support re 587 MOTION for Summary Judgment filed by North China Pharmaceutical Group Corp.. (Attachments: # 1 Exhibit A) (Prescott, Darrell) (Entered: 12/10/2012)

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2/8/2013 635 **MEMORANDUM DECISION AND ORDER** denying (587) Motion for Summary Judgment; granting in part and denying in part (595) Motion to Compel. See attached order for further details. Ordered by Judge Brian M. Cogan on 2/8/2013. Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Siegfried, Evan) (Entered: 02/08/2013)

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2/25/2013	658	Minute Entry for proceedings held before Judge Brian M. Cogan: Jury Selection held on 2/25/2013.(Court Reporter Charleane Heading) (Lee, Tiffeny) (Entered: 02/26/2013)
2/25/2013		Minute Entry for Jury Trial begun on 2/25/2013 before Judge Brian M. Cogan. All parties present. Opening statements. Jury Trial continued to 2/26/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Marsha Diamond.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) Modified. (Entered: 02/26/2013)
2/26/2013		Minute Entry for Jury Trial held on 2/26/2013 before Judge Brian M. Cogan. All parties present. Evidence entered; testimony heard. Jury Trial cont'd to 2/27/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Marsha Diamond.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 02/26/2013)
2/27/2013		Minute Entry for Jury Trial held on 2/27/2013 before Judge Brian M. Cogan. All parties present. Evidence entered; testimony heard. Jury Trial

	cont'd to 2/28/2013 at 9:30 AM in Courtroom 8D South.(Court Reporter Marsha Diamond.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 02/27/2013)
2/28/2013	Minute Entry for Jury Trial held on 2/28/2013 before Judge Brian M. Cogan. All parties present. Evidence entered; testimony heard. Jury Trial cont'd to 3/4/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Anthony Mancuso.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 02/28/2013)
	* * *
3/4/2013	Minute Entry for Jury Trial held on 3/4/2013 before Judge Brian M. Cogan. All parties present. Evidence entered; testimony heard. Jury Trial cont'd to 3/5/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Mary Agnes Drury.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/04/2013)
	* * *
3/5/2013	Minute Order for proceedings before Judge Brian M. Cogan: All parties

present. Motions for Reconsideration 125 and 614 are denied on the record. Jury Trial held on 3/5/2013. Evidence entered; testimony heard. Plaintiffs rests. Jury Trial cont'd to 3/6/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Mary Agnes Drury.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO(Clarke, Melonie) (Entered: 03/05/2013)

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3/6/2013 Minute Entry for Jury Trial held on 3/6/2013 before Judge Brian M. Cogan. All parties present. Evidence entered; testimony heard. Jury Trial cont'd to 3/7/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Mary Agnes Drury.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/06/2013)

* * *

3/7/2013 Minute Order for proceedings before Judge Brian M. Cogan: All parties present. Motion in Limine 666 is granted on the record. Jury Trial held on 3/7/2013. Evidence entered; testimony heard. Jury Trial cont'd to 3/11/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Mary

	Agnes Drury.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO(Clarke, Melonie) (Entered: 03/07/2013)
	* * *
3/11/2013	Minute Entry for Jury Trial held on 3/11/2013 before Judge Brian M. Cogan. All parties present. Evidence entered; testimony heard. Defendants'rests. Charging Conference set for 3/12/2013 at 10:30 AM in Courtroom 8D South. (Court Reporter Victoria Butler.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/11/2013)
	* * *
3/12/2013	Minute Order for proceedings held before Judge Brian M. Cogan. All parties present. Motion in Limine(674) granting in part on the record. Charging Conference held on 3/12/2013. Jury Trial cont'd to 3/13/2013 at 10:30 AM in Courtroom 8D South. (Court Reporter Victoria Butler.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO(Clarke, Melonie) (Entered: 03/12/2013)
3/13/2013	Minute Entry for Jury Trial held on 3/13/2013 before Judge Brian M. Cogan. All parties present.

		Closing arguments. Jury charged. Deliberations will resume 3/14/2013 at 9:30 AM in Courtroom 8D South. (Court Reporter Victoria Butler.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/13/2013)
		* * *
3/14/2013		Minute Entry for Jury Trial completed on 3/14/2013 before Judge Brian M. Cogan. All parties present. The jury deliberated and returned a verdict in favor of plaintiffs. The jurors were polled and excused. On motion of plaintiffs, the Court directed entry of judgment in favor of plaintiffs and against defendants in the amount of $162,300,000. (Court Reporter Victoria Butler.) Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/14/2013)
3/14/2013	675	JURY VERDICT Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/14/2013)
3/14/2013	676	JUDGMENT: The jury having rendered its verdict in this case in favor of plaintiff, the Ranis Company, Inc., as representative of the Direct Purchaser

Class, in the amount of $54,100,000.00, and the Court, upon motion of plaintiff, having directed entry of judgment upon trebling the damage award pursuant to 15 U.S.C.§ 15(a), less $9,000,000 received from former defendants, it is hereby ORDERED and ADJUDGED, that the Ranis Company, as class representative, take judgment against defendants, Hebei Welcome Pharmaceutical Co., Ltd. and North China Pharmaceutical Group Corp., jointly and severally, in the amount of $153,300,000. Ordered by Judge Brian M. Cogan on 3/14/2013. Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Clarke, Melonie) (Entered: 03/14/2013)

* * *

4/11/2013 688 MOTION for Judgment as a Matter of Law *to Reduce Damages by $7.5 Million (Before Trebling) Due to Speculation, Guess and Surmise as to Co-Conspirator Sales* by Hebei Welcome Pharmaceutical Co. Ltd.. Responses due by 4/25/2013 (Attachments: # 1 Memorandum in Support of Defendants' Renewed Motion for Judgment as as Matter of Law to Reduce Damages by $7.5 Million (Before Trebling) Due to

Speculation, Guess and Surmise as to Co-Conspirator Sales, # 2 Exhibit A, # 3 Exhibit B) (Stillman, Catherine) (Entered: 04/11/2013)

4/11/2013 689 MOTION for Judgment as a Matter of Law (Renewed) Under Fed. R. Civ. P. 50(b) by North China Pharmaceutical Group Corp.. Responses due by 4/25/2013 (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O, # 17 Exhibit P, # 18 Exhibit Q, # 19 Exhibit R, # 20 Exhibit S, # 21 Exhibit T, # 22 Exhibit U, # 23 Exhibit V, # 24 Exhibit W, # 25 Exhibit X, # 26 Exhibit Y, # 27 Exhibit Z, # 28 Exhibit AA, # 29 Exhibit BB, # 30 Exhibit CC, # 31 Exhibit DD, # 32 Exhibit EE, # 33 Exhibit FF, # 34 Exhibit GG, # 35 Exhibit HH, # 36 Exhibit II) (Stillman, Catherine) (Entered: 04/11/2013)

* * *

4/11/2013 691 MOTION for Judgment as a Matter of Law (Renewed) Based on Act of State, Foreign Sovereign Compulsion, and International Comity by Hebei

	Welcome Pharmaceutical Co. Ltd.. Responses due by 4/25/2013 (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O, # 17 Exhibit P, # 18 Exhibit Q, # 19 Exhibit R, # 20 Exhibit S, # 21 Exhibit T, # 22 Exhibit U, # 23 Exhibit V, # 24 Exhibit W, # 25 Exhibit X, # 26 Exhibit Y) (Stillman, Catherine) (Entered: 04/11/2013)
4/12/2013	ORDER in case 1:05-cv-00453-BMC-JO; terminating (689) Motion for Judgment as a Matter of Law; terminating (691) Motion for Judgment as a Matter of Law in case 1:06-md-01738-BMC-JO. Rule 50(b) provides that a party may file "a" renewed motion for judgment as a matter of law; it does not provide that a party may file three motions for judgment as a matter of law. It is unclear why defendants felt the need to file three motions instead of one motion with their different grounds for relief. The latter two motions are therefore terminated. The court will consider the grounds raised in those

motions as part of its determination of motion 688. Defendant is directed not to refile. Ordered by Judge Brian M. Cogan on 4/12/2013. Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Cogan, Brian) (Entered: 04/12/2013)

* * *

4/12/2013 693 Notice of MOTION for Permanent Injunction by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. Responses due by 4/29/2013 (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1, # 3 Proposed Order) (Coolidge, Melinda) (Modified) (Entered: 04/12/2013)

* * *

5/10/2013 702 MEMORANDUM in Opposition re 688 MOTION for Judgment as a Matter of Law to Reduce Damages by $7.5 Million (Before Trebling) Due to Speculation, Guess and Surmise as to Co-Conspirator Sales filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 PX 21 to PX 165, # 5 PX 173 to PX 320, # 6 PX 386 to PX 386A, # 7 PX 425 part 1, # 8 PX 425 part 2, # 9 PX 425 part 3, # 10 PX 425A, # 11 PX 426 part 1,

12 PX 426 part 2, # 13 PX 426 part 3, # 14 PX 426A, # 15 PX 427, # 16 PX 427A to PX 442, # 17 DTX 28 to DTX 68, # 18 Video Exhibit 1 to Video Exhibit 6) (Milici, Jennifer) (Entered: 05/10/2013)

* * *

5/13/2013 705 MEMORANDUM in Opposition *to Injunction Class Plaintiffs' Motion for Permanent Injunction* filed by Hebei Welcome Pharmaceutical Co. Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (Stillman, Catherine) (Entered: 05/13/2013)

* * *

5/31/2013 764 REPLY in Support of *Defendants' Renewed Motion for Judgment as a Matter of Law* filed by Hebei Welcome Pharmaceutical Co. Ltd.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (Stillman, Catherine) (Entered: 05/31/2013)

* * *

6/6/2013 766 REPLY in Support re 693 Notice of MOTION for Permanent Injunction filed by Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453. (Attachments: # 1 Proposed

Order (Amended)) (Coolidge, Melinda) (Entered: 06/06/2013)

* * *

11/26/2013 800 **MEMORANDUM DECISION AND ORDER**. Defendants' renewed motion for judgment as a matter of law 688 is denied and the Injunction Class's motion for a permanent injunction 693 is granted. An Amended Judgment and Decree will issue by separate order. Ordered by Judge Brian M. Cogan on 11/25/2013. Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Siegfried, Evan) (Entered: 11/26/2013)

11/27/2013 801 AMENDED JUDGMENT AND FINAL DECREE: The Ranis Company, as class representative, will take damages of defendants Hebei Welcome Pharmaceutical Co., Ltd. and North China Pharmaceutical Group Corp. jointly and severally, in the amount of One Hundred Fifty Three Million Three Hundred Thousand Dollars ($153,300,000). Ordered by Judge Brian M. Cogan on 11/27/2013. Associated Cases: 1:06-md-01738-BMC-JO, 1:05-cv-00453-BMC-JO (Marziliano, August) Modified on 11/27/2013 (Marziliano, August). Modified on 11/27/2013 (Marziliano, August). (Entered: 11/27/2013)

* * *

12/23/2013	814	NOTICE OF APPEAL as to 801 Judgment, by Hebei Welcome Pharmaceutical Co. Ltd., North China Pharmaceutical Group Corp.. Filing fee $ 505, receipt number 0207-6632038. (Jacobson, Jonathan) (Entered: 12/23/2013)

* * *

1/6/2014	822	Subsequent/Amended NOTICE OF APPEAL as to 816 Clerk's Judgment,,, 801 Judgment, by Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453, North China Pharmaceutical Group Corp. No fee for an Amended Notice of Appeal. Service done electronically. Associated cases: 06-md-1738-BMC-JO and 05-cv-453-BMC-JO (McGee, Mary Ann) (Entered: 01/06/2014)

* * *

2/12/2014	835	THIRD AMENDED JUDGMENT AND FINAL DECREE that The Ranis Company, as class representative, will take of defendants Hebei Welcome Pharmaceutical Co., Ltd. and North China Pharmaceutical Group Corp., jointly and severally, damages in the amount of One Hundred Forty Seven Million Eight Hundred Thirty One Thousand Four Hundred Seventy One

Dollars and 03/100 ($147,831,471.03) with post judgment interest thereon pursuant to 28 U.S.C.§ 1961 nunc pro tunc to March 14, 2013 Signed Douglas C. Palmer, Clerk of Court by Michele Gapinski, Chief Deputy Clerk on 2/12/2014. (Lee, Tiffeny) (Entered: 02/12/2014)

* * *

2/18/2014 837 Subsequent NOTICE OF APPEAL by Hebei Welcome Pharmaceutical Co. Ltd., North China Pharmaceutical Group Corp. SECOND *AMENDED NOTICE OF APPEAL as to 835 THIRD AMENDED JUDGMENT AND FINAL DECREE, 816 SECOND AMENDED JUDGMENT AND FINAL DECREE, and 801 AMENDED JUDGMENT AND FINAL DECREE.* (Jacobson, Jonathan) (Entered: 02/18/2014)

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.RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT EASTERN DISTRICT OF NEW YORK (BROOKLYN) CIVIL DOCKET FOR CASE #: 1:05-CV-00453-BMC-JO

Date Filed	#	Docket Text
1/26/2005	1	COMPLAINT against Shijiazhuang Pharmaceutical (USA) Inc., China Pharmaceutical Group, Ltd., Hebei Welcome Pharmaceutical Co. Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Northeast Pharmaceutical Group Co. Ltd., Weisheng Pharmaceutical Co. Ltd. filing fee $ 150, receipt number 305013, filed by Animal Science Products, Inc., The Ranis Company, Inc.. (Attachments: # 1 Civil Cover Sheet)(Bowens, Priscilla) (Entered: 02/02/2005)
		* * *
2/15/2006	40	Letter dated February 14, 2006 from the MDL Panel, enclosing a copy of the Panels Transfer Order consolidating this MDL action in EDNY, and assigning it to Judge Trager. (Attachments: # 1 MDL Transfer Order)Associated Cases: 1:06-md-01738-DGT-RML,1:05-cv-00453-DGT-RML,1:05-cv-06059-DGT-RML,1:06-cv-00149-DGT-RML(Brown, Marc) (Entered: 02/22/2006)
		* * * *

SELECTED EXHIBITS FROM THE MOTION-TO-DISMISS RECORD BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SELECTED EXHIBITS TO THE DECLARATION OF JOEL M. MITNICK IN SUPPORT OF THE BRIEF OF AMICUS CURIAE THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, FILED SEPTEMBER 22, 2006

ARTICLES OF ASSOCIATION OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES & HEALTH PRODUCTS IMPORTERS & EXPORTERS, APPROVED MARCH 22, 2002

CHINA CHAMBER OF COMMERCE OF MEDICINES & HEALTH PRODUCTS IMPORTERS & EXPORTERS

Chapter I General Provisions

Article 1

The name of this entity is China Chamber of Commerce Medicines & Health Products Importers & Exporters (hereinafter referred to as the Chamber of Commerce). The abbreviation of the name shall be CCCMHPIE.

Article 2

The Chamber of Commerce is a national-wide and self-disciplined social entity voluntarily organized by various economic organizations registered in the territory of the People's Republic of China and engaging in the import and export of medicines and health products and other relevant activities, with objectives of the trade coordination and service. The Chamber of Commerce shall

be non-profitable and not involved in business activities irrelevant with its coordination operations and in conflict with interests of its members.

Article 3

The Chamber of Commerce shall abide by the Constitution, national laws, administrative regulations, national principles and policies on foreign trade, observe the social morals and carry out the principles of democracy, openness, fairness and justice. The objective of the Chamber of Commerce is to coordinate and guide the import and export of medicines and health products and other relevant activities, provide consultancy service to members and other organizations, maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade, safeguard lawful rights and interests of member organizations, and to boost the sound development of the import and export of medicines and health products.

Article 4

With the approval of the competent authority under the State Council, the Chamber of Commerce Is registered according to the law and shall have the independent status of legal person.

Article 5

The emblem of the Chamber of Commerce is a capsule of patent medicine with the English abbreviation of China Chamber of Commerce of Medicines & Health Products Importers & Exporters printed in the middle and two arc arrowheads in the opposite directions at the top and the bottom, the color of which is green.

Article 6

The domicile of the Chamber of Commerce: No. 12, Pan Jia Yuan Nan Li, Chao Yang District, Beijing.

Chapter II Scope of Business

Article 7

The Chamber of Commerce shall:

(1) Guide and coordinate the foreign trade activities for its members, and provide consultancy service;

(2) Strengthen the relationship with the relevant departments of the government and promote the realization of the overall objectives of the government; represent the interest of the trade and its member enterprises, reflect opinions and requests of the member enterprises to the government, and render consultations and proposals to the government for policy-making;

(3) Reinforce the contact, interchange and cooperation with the same trade organizations of scientific research, manufacture and domestic circulation, accelerate the integration of research, manufacture and commercial trade, and jointly maintain the order of the import and export; coordinate the import and export prices, market and clients of medicines and health products in accordance with the authorization of the government or the collective demands and the agreements of the same trade;

(4) Propagandize national laws, regulations and policies on foreign trade, and the rules of the World Trade Organization, and assist the competent authority under the State Council to guide and supervise the lawful operations of its member enterprises;

(5) Establish and develop internet websites and business information databases, collect and study and exchange business information data, issue publications, carry out investigation and study on the market and situation of the import and export of medicines and health products international trade practices and conventions and trade-restraint measures of certain countries, and render information and consultation services to member enterprises;

(6) Organize enterprises concerned in the trade to respond to antidumping or countervailing lawsuits or claims against China's medicines and health products; carry out investigations on the dumping or other unfair competition activities of foreign medicines and health products within China's customs territory and report to the government thereof;

(7) Organize domestic and international symposiums and undertake home and oversea training on business operation;

(8) Organize imports and exports fairs and expos for medicines and health products; organize or coordinate the participation of enterprises of the trade in home and oversea fairs, exhibitions and expos; organize overseas study tours, market promotions, product procurements and technical exchanges; assist its members in product advertisements and international market promotions.

(9) Join international organizations of the same trade as the representative of China's domestic trade; attend relevant international professional conferences, and strength the contact, cooperation and exchange with foreign organizations of the same trade;

(10) Mediate the disputes between its member enterprises fairly, promote the self-disciple of this trade and the inter-discipline and self-disciple of enterprises, and safeguard the normal operation order the import and exports and the common interests of its member enterprises;

(11) Implement the authorizations of the competent authority under the State Council or fulfill other obligations endowed by the common demands of its member enterprises and agreements of the same trade.

Chapter III Member

Article 8

The member of the Chamber of Commerce shall be an entity principally.

Article 9

Entities with desire to be a member of the Chamber of Commerce shall satisfy the following requirements:

(1) Supporting of the Articles of Association of the Chamber of Commerce,

(2) The Expression of its desire to join the Chamber of Commerce,

(3) Established and registered in the territory of China according to law and involvement in trade of import and export of medicines and health products or other relevant activities.

Article 10

The procedures of joining the Chamber of Commerce shall be as follows:

(1) To submit a written application;

(2) To submit registration documents issued by relevant departments of the government;

(3) After passing the examination of qualification by the Chamber of Commerce and payment of the registration fee, the applicant shall be registered as a member and be awarded a membership certificate.

Article 11

Rights of members shall be as follows:

(1) To vote and to stand for election;

(2) To participate in activities organized by the Chamber of Commerce;

(3) To enjoy all kinds of services provided by the Chamber of Commerce with priority;

(4) To supervise the work of the Chamber of Commerce, and to put forward comments and suggestions thereof;

(5) To impeach, propose punishments and to defend itself when indicted;

(6) To voluntarily join and freely quit the Chamber of Commerce.

Article 12

Obligations of members shall be as follows:

(1) To abide by national laws and administratives regulations, and implement the national guiding principles and policies on foreign trade.

(2) To observe by the Articles of Association of the Chamber of Commerce, carry out its resolutions and stipulations, and fulfill tasks assigned by the Chamber of Commerce;

(3) Maintain interests of the statement and the trade, and not to infringe upon interests of other members;

(4) To pay membership dues in accordance with the Articles of Association;

(5) To report the statement of work affairs, relevant information and statistics data to the Chamber of Commerce.

Article 13

Should a member intend to quit the Chamber of Commerce, it shall submit a written application to the Chamber of Commerce and hand in its membership certificates.

Article 14

The Chamber of Commerce is entitled to suspend and/or abrogate the membership of a member in case that anyone of the following conditions is satisfied:

(1) Member dues have been in arrears for more than two years;

(2) Nonparticipation of activities organized by the Chamber of Commerce has been more than two years.

Article 15

Should a member violate the Articles of Association of the Chamber of Commerce or the coordination regulations and disregard the exhortation, the Chamber of Commerce

could circulation a notice of criticism, issue a warning or suspend the membership of this member in case of fairly serious violation in nature, the Chamber of Commerce could, with the approval of the board of directors or the standing board of directors, deprive this member of its membership.

Chapter IV Organization Structure, Election and Dismission of Person in Charge

Article 16

The supreme power of the Chamber of Commerce rest with the General Member (or Member Representative) Meeting. The General Member (or Member Representative) Meeting executes the following powers:

(1) To formulate and amend the Articles of Association of the Chamber of Commerce;

(2) To elect or dismiss members of the Board of Directors;

(3) To examine the work report and financial report of the Board of Directors;

(4) To examine the proposals from the Board of Directors, branches of the Chambers of Commerce and members;

(5) To terminate the Chamber of Commerce;

(6) To decided other important matters.

Article 17

Representatives to the General Member (or Member Representative) Meeting shall be selected democratically or decided by democratic consultation. The detailed

election rules shall be made by the board of directors in charge of the preparation for the General Member (or Member Representative) Meeting.

Article 18

The General member (or Member Representative) Meeting shall be convened with the presence of more than two thirds of members of the Chamber of Commerce, and resolutions shall come into force when half of votes presented at the General Member (or Member Representative) Meeting uphold them.

Article 19

The tenure of each General Member (or Member Representative) Meeting is three years. Special General Meeting (or Member representative) Meeting for reelection shall be convened in advanced or postponed in case of emergency or proposal by more than one third of members. The convene of the Special general Meeting (or member representative) Meeting shall comply with the prescription of Article [illegible] and be approved by the government agency responsible for social entity registration, but in no case the postponement of reelection can be more than one year.

Article 20

The executive body of the General Member (or Member Representative) Meeting is the board of directors. The board of directors shall be responsible for the routine operation of the Chamber of Commerce between sessions of the General Member (or Member Representative) Meeting.

The General Member (or Member Representative) Meeting shall elect the board of directors from candidates proposed by a member itself or by members jointly in accordance with the principle of democratic consultation. The measures to determine the candidate list shall be made by the board of directors in charge of the preparation for the General Member (or Member Representative) Meeting.

Article 21

The board of directors shall be responsible to the General Member (or Member Representative) Meeting and executive the following powers:

(1) To carry out the resolutions of the General Member (or Member Representative) Meeting;

(2) To elect and dismiss the president, vice president, secretary-general of the board of directors; to appoint the vice secretary-general;

(3) To prepare for the convene of the General Member (or Member Representative) Meeting;

(4) To determine the membership dues and the payment;

(5) To make the work report and the financial statements to the General Member (or Member Representative) Meeting;

(6) To examine and approve annual work plans;

(7) To examine and approve the annual financial budget and final accounts;

(8) To authorize affiliated working departments to recruit enterprises;

(9) To determine on other important matters.

Article 22

The board of directors shall be convened with the presence of more than two thirds of directors, and the affirmative votes of more than two thirds of present directors shall validate the resolutions of the board of directors.

Article 23

The meeting of the board of directors shall be held at least once a year and be chaired by the president of the Chamber of Commerce. Where considered to be necessary by the president or requested jointly by more than one third of directors, a special meeting of the board of directors may be held. Under certain particular circumstances, the meeting could be held by means of communications.

Article 24

A standing board of directors shall be set up and the number of standing directors shall not exceed one third of the number of directors in principle. The standing board of directors shall be elected by the board of directors and be responsible for it. The functions of the standing board of directors between sessions of the board of directors shall be as follows:

(1) To carry out resolutions of the General Member (or Member Representative) Meeting and the board of directors;

(2) To decide on the disciplinary actions against members concerned;

(3) To direct the routine operation of affiliated departments of the Chamber of Commerce;

(4) To determine on the establishment of branches, representative offices and affiliated entities and organization and staff members thereof;

(5) To determine on the establishment of departments under the standing working organizations and staff members thereof;

(6) To examine and approve criterions of this trade, agreements, regulations and management rules;

(7) To decide on other important matters.

Article 25

The meeting of the standing board of directors shall be convened with the Presence of more than two thirds of standing directors, and resolutions shall come into force with the approval of more than two thirds of present standing directors.

Article 26

The standing board of directors shall be convened semiannually and be chair by the president of the Chamber of Commerce. Where considered to be necessary by the president or requested jointly by more than one third of standing directors, a special meeting of the standing board of directors may be held. Under certain particular circumstances, the meeting could be held by means of communications.

Article 27

The Chamber of Commerce comprises of one president, several vice presidents (inclusive of part-time vice president when necessary) and one secretary-general (maybe concurrently held by full-time vice president).

Article 28

The candidates for the president, vice presidents and the secretary-general may be recommended by the competent authorities, or be recommended jointly by more than one third of members and approved by the competent authorities.

The candidates recommended by the competent authorities for the president, vice presidents and the secretary-general shall be taken as candidates for directors.

Article 29

The presidential management meeting shall be set up under the Chamber of Commerce. The president convenes and chairs this meeting and the member of it shall be the president, full-time vice-presidents and secretary-general. The presidential management meeting makes decisions on routine operation affairs according to the principles of democracy and centralization. The president, on behalf of the presidential management meeting, exercises the following powers:

(1) To convene and preside meetings of the board of directors and the standing board of directors;

(2) To inspect the implementation of resolutions made by the General Member (or Member Representative) Meeting, the board of directors and the standing board of directors;

(3) To sign important documents as the representative of the Chamber of Commerce;

(4) To recommend vice secretary-general candidates for the approval of the board of directors;

(5) To make proposals of the department establishment of standing working organizations and staff members thereof, and decide the employment of principal managers;

(6) To make proposals of the establishment and withdrawal of branches, representative offices, affiliated entities and personnel thereof, and decide on the employment of principal managers;

(7) To decide on the employment of full-time personnel in standing working organizations, branches, representative offices and affiliated entities;

(8) To take charge of the routine operation of working organizations and organize the fulfillment of annual work plans;

(9) To direct the operation of branches, representative offices and affiliated entities;

(10) To deal with other daily affairs.

Vice presidents and the secretary-general shall assist the president in the operation of the Chamber of Commerce.

Article 30

The president, vice presidents and the secretary-general shall satisfy the following requirements:

(1) Adhering to the routes, guidelines and policies of the Party, and possess sound political qualification;

(2) Having working experiences in the trade of the Chamber of Commerce;

(3) Complying with the age requirement stipulated by the state;

(4) Physically healthy for daily work;

(5) No record of criminal punishments in conjunction with the deprival of political rights;

(6) Having full civil right ability.

Article 31

The president, the vice-president or the secretary-general, whose age exceeds the limitation prescribed by the competent authorities, may assume office when firstly be approved by the board of directors, and then be rectified by the competent authorities and the government agency responsible for social entity registration.

Article 32

The president, the vice-president and the secretary-general may serve a term of three years and may continue to serve one more term provided being elected again, but no more than two consecutive terms. Where it is necessary for the prolong of the tenure, the continuation of that position shall firstly be approved by the General Member (or Member Representative) Meeting, and then be rectified by the competent authorities and the government agency responsible for special entity registration.

Article 33

The legal representative of the Chamber of Commerce shall be the president. Where it is necessary for one vice-president or the secretary-general to be the legal representative, it shall be approved by the competent authorities and the government agency responsible for social entity registration firstly.

The president, full-time vice presidents and the secretary-general of the Chamber of Commerce shall not take part-time positions in other entities, while the part-time vice president may maintain his position in his former entity.

Article 34

The Chamber of Commerce may employ an honorary president and certain number of advisors when necessary.

Chapter V Working Bodies and Branches

Article 35

Where it is necessary for the work, departments subordinate to the working bodies may be set up to deal with routine operation of the Chamber of Commerce with the approval of the board of directors or the standing board of directors. The establishment of standing working bodies shall comply with the stipulations of the state.

Article 36

Where it is necessary for the business development, the Chamber of Commerce may establish its branches in charge of various kinds of products imported and exported (hereinafter referred to as Branches), and may also set up representative offices in the main producing areas of the export products, principal ports and central foreign markets. The establishment of Branches and representative offices shall be determined by the board of directors or the standing board of directors firstly, and then approved by the government department directing regulating the trade of the Chamber of Commerce and the government agency responsible for social entity registration.

Article 37

Branches shall consist of the member enterprises operating the same kind of products, and for one kind of products only one branch can be established.

Article 38

Branches and representative offices of the Chamber of Commerce shall not set up branches.

Article 39

Branches and representative offices of the Chamber of Commerce, with individual legal person status, are integral parts of and regulated by the Chamber of Commerce. Under the guidance and supervision of the Chamber of Commerce, branches and representative offices shall carry out functions within authorization in accordance with the Articles of Association the Chamber of Commerce.

Article 40

Branches shall convene meeting of their members regularly and irregularly when necessary. The functions of the meeting are as follows:

(1) To elect or remove the members of the board of directors of Branches;

(2) To enact or amend management rules and work plans of the branches, and examine the work reports of the board of directors of the branches;

(3) To enact or amend the specific coordinating stipulations of importing and exporting products;

(4) To formulate or adjust the pricing plans of importing and exporting products;

(5) To examine and approve the proposals of the board of directors of branches;

(6) To examine whether the coordinating stipulations of importing and exporting products and the price coordinating plans are well carried out, and to make suggestions on solutions of problems arising in the coordinating work and punishment against wrongdoing member enterprises.

Article 41

The board of directors of Branches shall be responsible to the meeting of branch member, and exercise functions of the meeting of branch members when it is not in session. In accordance with the regulations of the Chamber of Commerce, resolutions of the meeting of branch members and work plans, the board of directors of branches shall carry out routine operation of work and be responsible for reporting the state of work affairs to the Chamber of Commerce and submit opinions on the disposal of specific matters.

Article 42

The board of directors of branches shall be elected by the meeting of branch members and consist of the president, the vice president, the secretary-general , the vice secretary-general and a certain number of directors of that branch.

Article 43

General a branch shall not maintain a standing administrative body. The routine work of a branch shall be taken over the Chamber of Commerce when the board of directors of the branch is not in session. While with

the approval of the standing board of directors of the Chamber of Commerce, a branch may set up a standing administrative body for special need.

Article 44

No branch membership dues shall be paid. The funds of branches shall be appropriated and managed by the Chamber of Commerce.

Article 45

Upon the request of members, each province, municipality and autonomous region may set up liaison institutions in order to promote the contact of members, and such institutions shall be responsible for the liaison work and information exchange between members within its own region, and when necessary, undertake a certain special assignments with the authorization of the Chamber of Commerce.

Chapter VI Management of Finance

Article 46

Sources of funds of the Chamber of Commerce are the following:

(1) Membership dues;

(2) Donations;

(3) Government financial aid;

(4) Income from approved business operations and service;

(5) Interests;

(6) Other lawful incomes.

Article 47

The Chamber of Commerce demands membership dues pursuant to the regulations of the state.

Article 48

Membership dues payable to the Chamber of Commerce shall be spent on the development of business with the business scope prescribed by the Articles of Association, and shall not be distributed among members.

Article 49

The Chamber of Commerce adopts restrict financial system on budget and find accounting. All revenue and expenditure shall be included in the budget and accounted uniformly. The budget and final accounting of finance shall be carried out annually and approved by the board of directors. Especially the budget for government appropriate funds or government financial aid and entrusted projects shall be implemented with the approval of the government authorities concerned.

Article 50

The budget and final accounting of finance shall be formulated and carried out in accordance with the principles of "the balance of revenue and expenditures and the elimination of budget deficit."

Article 51

The annual budget and final accounting of finance shall include the following:

(1) Revenue to be budgeted and accounted according to the sources thereof;

(2) Expenditures to be budgeted and accounted according to items prescribed for institution expenditures including operating expenses, public affairs expenses, expense for special projects, expense for fixed assets, personnel expense, etc.

Article 52

The board of directors may authorize directors of the Chamber of Commerce to inspect the fulfillment of the budget and final accounts of finance regularly or irregularly.

Article 53

Referring to The Financial Accounting System for institutions during the financial operation, the Chamber of Commerce shall constitute perfect systems of internal controlling and division of functions and responsibilities, and establish restrict financial management system so as to secure the legality, authenticity, accuracy and integrality of account data.

Article 54

The Chamber of Commerce shall be proved with accountant staff with professional qualification. The accountant staff cannot act as cashers concurrently. Provided that an accountant is transferred to other positions or resign, the procedure of delivery to the successor must be finalized heretofore.

Article 55

The asset management of the Chamber of Commerce shall abide by the rules as of finance management stipulated by the state, and be subject to the supervision of the General Member (or Member Representative) Meeting and the financial authorities of the government. Provided that the

assets are from government-appropriated funds, social donations or financial aids, the asset management shall be subject to the supervision of the auditing authorities of the government.

Article 56

Before the reelection of the Chamber of Commerce or the change of legal representative, financial audit shall be carried out in accordance with stipulations of the competent authorities and the government agency responsible for social entity registration.

Article 57

No asset of the Chamber of Commerce shall be usurped on, distributed or embezzled by any entity or individual.

Article 58

The salary, welfare and social security of full-time staff of the Chamber of Commerce may refer to the state stipulations on institution entity.

Article VII The Amendment Procedure of the Articles of Association

Article 59

The amendment to the Articles of Association shall be submitted to the General Member (or Member Representative) Meeting for examination after the approval of the board of directors.

Article 60

The amended Articles of Association shall come into force after is it submitted within 15 (fifteen) days since the approval day of the General Member (or Member Representative) Meeting and is ratified by the competent

authorities and the government agency responsible for social entity registration.

Article VIII Termination and Asset Disposal

Article 61

Under circumstances such as the fulfillment of objectives, voluntary termination, merger or separation of the Chamber of Commerce, the board of directors may propose motions to terminate the Chamber of Commerce.

Article 62

The motion of termination shall be approved the General Member (or Member Representative) Meeting and submitted to the competent authorities for ratification.

Article 63

Before termination, a liquidation group shall be set up, under the guidance of the competent authority and other competent institutions, to liquidate credits and debts, and deal with problems concerned with termination. No activities other than liquidation shall be carried out during the period of liquidation.

Article 64

The Chamber of Commerce shall be terminated after the registration at the government agency in charge of social entity registration is cancelled.

Article 65

Under the supervision of the competent authority and the government agency in charge of social entity registration, the surplus assets after termination shall be employed to development undertakings concerned with objectives

of the Chamber of Commerce in accordance with the stipulations of the state.

Chapter IX Miscellaneous Provisions

Article 66

The articles of Association have been approved at the meeting of the general member meeting on March 22, 2002.

Article 67

The board of directors is entitled to interpret the Articles of Association.

Article 68

The Article of Association shall come into force as of the date of the rectification by the government agency responsible for social entity registration.

CHINA CHAMBER OF COMMERCE OF MEDICINES HEALTH PRODUCTS IMPORTERS & EXPORTERS

MAJOY EXPORT COMMODITIES TO BE COORDINATED

Chinese Traditional Medicinal Materials (including those from the South)

1. Herbs
2. Animal Products
3. Minerals

Chinese Patent Medicines

Medicated wines

Health care drugs

Pharmaceuticals

1. Antibiotics
2. Sulfonamides
3. Antituberculotics
4. Antiparasitics
5. Antineoplastics
6. Cardio vascular drugs and diuretics
7. Steroids
8. Vitamins
9. Antipyretics and analgesics

10. Sedatives & Tranquilizers
11. Respiratory agents
12. Gastrointestinal agents
13. Poultry and Livestock drugs and feed additives
14. Biochemical pharmaceuticals/biologicals
15. Amino acids
16. Drugs for farming and animal husbandry
17. Isotopic drugs
18. Miscellaneous

Western Patent Medicines

Pharmaceutical media

Chemical reagents

Medical instruments and equipments

Medical rubber products

Medical dressings

Technology and services (in relation to the above mentioned commodities)

APPROVAL OF THE MINISTRY OF FOREIGN TRADE & ECONOMIC COOPERATION FOR ESTABLISHING THE VITAMIN C SUBCOMMITTEE OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES & HEALTH PRODUCTS IMPORTERS & EXPORTERS, DATED MARCH 23, 1998

Document of Personnel, Education and Labor Department of Ministry of Foreign Trade & Economic Cooperation

[1998] MOFTEC Ren Lao Zi No. 175

Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters

China Chamber of Commerce of Medicines & Health Products Importers & Exporters ("the Chamber"):

We hereby acknowledge the receipt of the document entitled Request for Establishing the Vitamin C Sub-Committee within the Chamber with reference number of [1998] Yi Shang Zi No. 20. We hereby give a reply as follows:

1. Request for Establishing the Vitamin C Sub-Committee within the Chamber is approved. The major responsibilities of VC Sub-Committee are: to be responsible for coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produce in the world market and promote the healthy developme[illegible] Vitamin C export of China.

2. The Vitamin C Sub-Committee is formed as a branch of the Chamber by the member enterprises of the Chamber that are engaged in Vitamin C export. It does not have a legal person status and is under the Chamber's leadership and administration. The Vitamin C Sub-Committee will not separately develop members or charge additional membership fees. The Chamber shall assist the Vitamin C Sub-Committee in staffing its personnel from the current state of the Chamber.

3. Please proceed with the relevant procedure at the Ministry of Civil Affairs and carry out work in accordance with laws.

We hereby make this reply.

March 23, 1998

1997 CHARTER OF THE VITAMIN C SUBCOMMITTEE OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES & HEALTH PRODUCTS IMPORTERS & EXPORTERS, DATED OCTOBER 11, 1997

Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters

(passed upon discussions on the founding conference of Vitamin C Coordination Group on October 11, 1997)

Chapter I General Terms

Article 1 This Charter is constituted in accordance with provisions in *Foreign Trade Law of People's Republic of China, Provisional Regulations on Chamber of Commerce of Importers and Exporters of People's Republic of China, Charter of China Chamber of Commerce of Medicines and Health Products Importers and Exporters* and *Notice Relating to Strengthening the Administration of Vitamin C Production and Export.*

Article 2 Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters (the "Sub-Committee") is an industrial organization organized, upon approval by the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and under leadership of the Chamber, by those member enterprises of China Chamber of Commerce of Medicines and Health Products Importers and Exporters (the "Chamber") who have Vitamin C import and export operation rights and have certain extent of operational scale and ability.

Article 3 The Sub-Committee has the following tenets: complying with laws of the country; implementing and executing the state policies and regulations on foreign trade; maintaining orderly export of Vitamin C products; exploring international market; and serving for an ordered and highly efficient development of Vitamin C foreign trade on the basis of unified coordination.

Article 4 The Sub-Committee is located in Beijing.

Chapter II Functions

Article 5 The Sub-Committee performs ordination, direction, consultation, service and supervision & inspection functions over its members. It bridges and ties the enterprises and the government. The Sub-Committee has certain industrial function. It shall, representing the basic interests and demands of the members, inform certain issues to the relevant government department and to cause such issues to be promptly solved.

Article 6 In accordance with Vitamin C exports and changes on international markets, the Sub-Committee will make proposals on the export development plan and annual export quota allocation, supervise the implementation of export license by member enterprises and advises on allocation and adjustment of expert quota, and issuance of export license.

Article 7 The Sub-Committee shall coordinate and administrate market, price, customer and operation order of Vitamin C export, represent or organize the members to communicate in unison with foreign parties in accordance with international trade principles to protect the rights

and interests of the country and the members.

Article 8 The Sub-Committee shall actively develop connections with domestic and foreign industries, exchange information, broadly build and develop business partnership and represent the industry to participate in relevant international conferences.

Article 9 The Sub-Committee shall collect and organize Vitamin C information and materials with respect to domestic and international market, customers, productions and sales, and provide consulting service to the members.

Article 10 The Sub-Committee shall hold, periodically or otherwise, working meetings for Vitamin C export to exchange information, summarize and communicate experience, analyze and work out coordinated prices for Vitamin C export, to supervise and inspect the implementation of such coordinated export prices sest by the Sub-Committee and relevant business activities related to the enterprises.

Chapter III Members

Article 11 Any member of China Chamber of Commerce of Medicines and Health Products Importers and Exporters whose Vitamin C export volume in any year from 1994 to 1996 is above 200 tons can apply to join the Sub-Committee.

Article 12 Only the members of the Sub-Committee have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota.

Article 13 Any member who wants to withdraw from the Sub-Committee, shall submit a 3-month prior written

application and such withdrawal shall be subject to approval by the Sub-Committee's Council.

Article 14 Member's rights

(1) To elect, to be elected and to vote;

(2) To supervise and give suggestions and comments on the Sub-Committee's work;

(3) To participate in activities organised by the Sub-Committee, enjoy various services including information and consultation provided by the Sub-Committee;

(4) To report and suggest punishment measures on any conduct violating laws and the Charter of the Sub-Committee, harmful to the state and industrial interests, and infringing legitimate rights and interests of the members.

Article 15 Member's obligations

(1) To comply with various directives, policies and regulations with respect to foreign trade, comply with the Charter and regulations of Vitamin C Sub-Committee and implement Sub-Committee's resolution;

(2) To foreign trade enterprises can purchase Vitamin C from or act as Vitamin C export agents only from

those manufacturing enterprises verified by the Sub-Committee. A manufacturing enterprise can only export its own products and can supply its products only to those foreign trade enterprises verified by the Sub-Committee.

(3) The members shall voluntarily adjust their production outputs according to changes of supplies and demands on international market;

(4) Manufacturing enterprise members and foreign trade enterprise members shall establish the cooperation relationship, understand and yield to each other and jointly share benefits and risks;

(5) To report Vitamin C exports of previous two months to the Sub-Committee every odd month;

(6) Strictly execute export coordinated price set by the Chamber and keep it confidential.

Article 16 Any violation of the Charter of the Sub-Committee, failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee by means of, according to gravity of circumstances, warning, open criticism and even

revocation of its membership. The Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel the vitamin export right of such violating member.

Chapter IV Organisation

Article 17 The Members Meeting is the highest authority of the Sub-Committee. The Members Meeting will be held once a year and shall only be duly convened when attended by representatives from two thirds of the members. The Members Meeting may be held earlier or later when necessary. The Sub-Committee has a Council. A Council Meeting will be held once every half year and may be earlier or later when necessary. The Council Meeting shall not be duly convened unless it is attended by two thirds of the Council's Directors.

Article 18 Functions of Members Meeting are:

(1) to approve and amend the Charter of the Sub-Committee;

(2) to review applications to join or withdraw from the Sub-Committee;

(3) to elect, appoint and dismiss members of the Council of the Sub-Committee;

(4) to review and pass work report of the Council and determine work plans of the Sub-Committee;

(5) to discuss and set export coordinated price;

(6) to inspect Vitamin C export coordination and administration and the implementation of export coordinated prices, and to suggest on punishment measures on violating member;

(7) to review and discuss proposals of the Council and the members.

Article 19 Functions of the Council

(1) Implementing and executing resolution of the Member Meeting and reporting to the Member Meeting;

(2) Stipulating specific regulations and measures of products operation and organising implementation;

(3) Proposing principle of annual export quota allocation;

(4) Calling for regular or temporary Members Meeting;

(5) Electing Chief Director and appointing General Secretary of the Council;

(6) Discussing and determining coordinated prices and other relevant issues under urgent circumstances.

Article 20 The Council of the Sub-Committee has one Chief Director, seven to nine Directors and one General Secretary. Members of the Council will be composed with the members of the Chamber and the members

of the Sub-Committee. Chief Director, Director and General Secretary will be elected upon nomination by the Chamber.

Article 21 Chief Director, Director and General Secretary have a term of three years, which can be renewed upon re-election. The Sub-Committee does not have any permanent body. General Secretary will be responsible for daily work when the Council is not in session.

Chapter V Funding Sources

Article 22 The Chamber will bear daily expenses of the Sub-Committee, but expenses on meetings and researches shall be collected and expensed by the Sub-Committee itself.

Chapter VI Miscellaneous

Article 23 This Charter will be passed by the Members Meeting and will become effective upon verification and approval by China Chamber of Commerce of Medicines and Health Products Importers and Exporters. The Members Meeting has the right to amend this Charter and the Council has the right to construe this Charter. Any amendment and supplementation to this Charter shall be verified and approved by China Chamber of Commerce of Medicines and Health Products Importers and Exporters.

1997 NOTICE RELATING TO STRENGTHENING THE ADMINISTRATION OF VITAMIN C PRODUCTION AND EXPORT BY THE MINISTRY OF FOREIGN TRADE & ECONOMIC COOPERATION AND STATE DRUG ADMINISTRATION, EFFECTIVE JANUARY 1, 1998

*Note: This Notice has been abolished by *List of 26 Abolished Ministerial Regulations of the Fourth Batch by Ministry of Foreign Trade and Economic Cooperation* (promulgation date: March 21, 2002, effective date: March 21, 2002).

1997 MOFTEC & SDA NOTICE

Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration

((1997) MOFTEC Guan Fa No. 664)

(Issued on November 27, 1997,
effective from January 1, 1998)

The Foreign Trade & Economic Cooperation Commissions (Departments and Bureaus) of each province, autonomous region and municipality, State Drug Administration (the "SDA") and relevant departments of drug administration, all Companies directly under the MOFTEC and loucal counterpart of MOFTEC, all representative offices of MOFTEC, China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber"):

China is one of the biggest countries manufacturing and exporting Vitamin C. At present, Vitamin C export encounters intense competitions and challenges from the international market. In order to rectify the operational order and optimize the operational team of Vitamin C export, realize the scale-operation on export, improve the competitiveness of our Vitamin C products in the international market, promote the healthy development of Vitamin C export and maintain the interest of our country and enterprises, we hereby set forth the following:

1. The scale of Vitamin C production shall be strictly controlled.

(1) The establishment of Vitamin C manufacturing enterprises (including foreign investment enterprises) shall be strictly controlled, and the existing enterprises shall not expand production capacity any more.

(2) The production licensing system shall apply to those Vitamin C manufacturing enterprises that already started production (not including foreign investment enterprises). The SDA shall issue the production licenses to the Vitamin C manufacturing enterprises, and be responsible for publicizing information of annual production guidance.

(3) For the enterprises that has been in continuous production in recent years and achieved certain scales, the production license can be issued to them.

(4) Only the products manufactured by the enterprises that are verified by the SDA and obtained the production license can be supplied for export.

SDA shall formulate specific regulations to implement the above principles and circulate such regulations to the enterprises after seeking comments from MOFTEC.

2. MOFTEC shall consult with SDA and relevant departments when determining the total volume of Vitamin C export and the principles for quota allotment.

3. The enterprises qualified to operate Vitamin C export are: the export enterprises whose annual export volume reached 200 tons in any one of the continuous years from 1994 to 1996, which include foreign trading companies, manufacturing enterprises with the right to export their own products, and foreign investment companies (excluding those starting production in 1997). One of the attachments hereof is a list of the authorized enterprises (Please refer to Annex 1).

4. The method for allocating export quota shall be improved, Vitamin C export operation team shall be optimized in order to achieve scale-operation on export.

Every local counterpart of MOFTEC shall distribute the export quota set by MOFTEC to the enterprises qualified to operate Vitamin C export in strict accordance with the provisions hereof. It is imperative to follow the principle of fostering the excellent and scrapping the obsolete, distribute the quotas in preference to the enterprises with proper operational capabilities and outstanding profitability.

5. The Chamber shall improve the coordination on Vitamin C export, and shall monitor, supervise and examine how this notice is implemented by Vitamin C export

enterprises, and timely report to MOFTEC about the relevant issues and problems.

6. The Chamber shall establish a Vitamin C Coordination Group (which was the temporary name of the Vitamin C Sub-committee before the Vitamin C Sub-committee is officially approved). The main responsibilities of this Group are to coordinate with respect to Vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities. All enterprise qualified to operate Vitamin C export shall participate in such Coordination Group and subject themselves to the coordination of the Group. The specific method for coordination shall be formulated by the Chamber, and filed to MOFTEC for record.

7. Vitamin C Export Coordination Group shall timely organize meetings for the major Vitamin C export enterprises according to the domestic and international market development, to conduct studies on marketing strategies, timely formulate and adjust export coordination price, which the Vitamin C export enterprises must strictly implement in accordance with. With respect to the enterprises competing at low price and reducing price through any disguised means, a penalty shall be imposed in strict accordance with Article 10 of this Notice.

8. The organisations that authorized by MOFTEC to issue export licenses shall strictly verify the qualification of Vitamin C export and operation of the enterprises, and verify their export contracts and issue export license according to the Vitamin C coordinated price and volume quotas.

9. Vitamin C export enterprises shall report the export situations to the Chamber at regular intervals (for detailed information, please refer to Annex 2). With respect to the export enterprises that make report beyond time or disguise report, a penalty shall be imposed as applicable.

10. With respect to the export enterprises with violations of relevant provisions hereof, if substantiated, penalties shall be imposed, specifically, the Vitamin C export quota may be reduced, in the worst case their Vitamin C export shall be revoked.

11. Relevant provisions of this Notice shall enter into force as of the date of January 1, 1998.

Ministry of Foreign Trade & Economic Cooperation of People's Republic of China

State Drug Administration

November 27, 1997

Annex 1

Vitamin C Export and Operation Enterprises List[1]

(Enterprises whose annual Vitamin C export volume reached 200 tons in any year from 1994 to 1996)

1. North East General Pharmaceutical Import & Export Co. Ltd.

2. Yingkou Sanyou Medical Chemical Co. Ltd.

3. JiLin Songyuan Food Industry Co. Ltd.

4. HeBei Provincial Medicines & Health Products Import & Export Co. Ltd.

5. HeBei Welcome Pharmaceutical Co. Ltd.

6. Shijiazhuang WeiSheng Pharmaceuticals Co. Ltd.

7. Shijiazhuang Pharmaceutical Group

8. JiangSu Jiang'an Pharmaceutical Co. Ltd.

9. JiangSu Jiangshan Pharmaceutical Co. Ltd.

10. JiangSu High Hope International Group Medicines & Health Products Import & Export Co. Ltd.

11. Shanghai Sunve Pharmaceutical Co. Ltd.

12. Shanghai Municipal Medicines & Health Products Import & Export Co. Ltd.

13. ShangDong Provincial Medicines & Health Products Import & Export Co. Ltd.

14. Jiangsu Kunshan Municipal Foreign Trade Co. Ltd.

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1. Enterprises listed in 1, 4, 5, 6, 7 and 9 are the defendants in the current litigation.

15. HuNan Provincial Medicines & Health Products Import & Export Co. Ltd.

16. AnHui Provincial Medicines & Health Products Import & Export Co. Ltd.

17. AnHui Provincial Chemicals Import & Export Co. Ltd.

18. JiangXi Provincial Medicines & Health Products Import & Export Co. Ltd.

19. Sinochem Ningbo Import & Export Co. Ltd.

20. China National Pharmaceutical Foreign Trade Co. Ltd

21. China National Medicines & Health Products Import & Export Co. Ltd.

22. China Export Bases Development Liaoning Co. Ltd.* (awaiting verification)

23. China North Industries Guangzhou Co. Ltd* (awaiting verification)

24. HaiNan Nanguang Import & Export Co. Ltd.* (awaiting verification)

25. HeBei Xinwei Pharmaceutical Co. Ltd.* (awaiting verification)

26. Mudanjiang Donghua Pharmaceutical Co. Ltd.* (awaiting verification)

27. AnHui Sitong Bio-Pharm Co. Ltd.* (awaiting verification)

28. Ningbo Jierfu Pharmaceutical Co. Ltd.* (awaiting verification)

29. Jinan Pharmaceutical Factory* (awaiting verification)

30. JiangXi Ganjiang Pharmaceutical Co. Ltd.* (awaiting verification)

Annex 2

Table of Vitamin C Export Status

Name of the Company:

Customs Reference No.:

Month __ Year __

Contract No.	Quantity	Amount	Unit Price	Price Terms	Manufacturer

Port of Destination	Export Country (Region)	Importer				Port of Entry	Time of Entry
		Name	Tel	Fax	Address		

Signed by: Tel:

Seal of Company: Seal of MOFTEC:

Note: This form shall be filled with the situations of the last two months and delivered to the Western Medicines Department of the Chamber before the 10th of every odd month.

2002 NOTICE ISSUED BY THE MINISTRY OF FOREIGN TRADE AND ECONOMIC COOPERATION AND THE GENERAL ADMINISTRATION OF CUSTOMS FOR THE ADJUSTMENT OF THE CATALOGUE OF EXPORT PRODUCTS SUBJECT TO PRICE REVIEW BY THE CUSTOMS, PROMULGATED MARCH 29, 2002 AND EFFECTIVE MAY 1, 2005

2002 MOFTEC & Customs Notice

Notice Issued by the Ministry of Foreign Trade and Economic Cooperation of the General Administration of Customs for the Adjustment of the Catalogue of Export Products Subject to Price Review by the Customs

MOFTEC MAO FA [2002] No. 187

Promulgation Date: March 29, 2002

Effective Date: May 1, 2005

Issued by: the Ministry of Foreign Trade and Economic Cooperation (hereinafter "MOFTEC") and the General Administration of Customs (hereinafter "GAC") [tr.]

To: Guangdong Branch, Tianjin and Shanghai Commissioners' Offices of GAC, Directly Subordinated Customs Offices, the Commissions (Offices/Bureaus) of Trade and Economic Cooperation of Every Province, Autonomous Region, Municipality and City Specifically Designated in the State Plan, the Commissioners' Offices of MOFTEC at Various Cities, and the Chambers of Import and Export

MOFTEC and GAC have made the decision to adjust the catalogue of export products subject to price review by the customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports, promote industry self-discipline and facilitate the healthy development of exports. The decision include the following aspects:

1. After adjustment, 30 categories of export products are subject to price review by the customs (see the Attachment of the Table of Export Products). All of the products are subject to Price Verification and Chop ("PVC") by the chambers, and no longer subject to supervision and review by the customs.

2. The relevant chambers of import and export and customs offices shall strengthen communication and cooperation among themselves in accordance with the Rules for Coordination with Respect to Customs Price Review of Export Products issued together with the Notice of the Rules on Price Reviews of Export Products by the Customs ([1997] MOFTEC GUAN ZONG HAN ZI No. 21), promptly report any issues arising from export price review exercise, jointly perform the export price review responsibility and file the annual price review report with MOFTEC and GAC.

3. Following the adjustment made under this Notice, the relevant chambers must, by April 20, 2002, submit to Guangzhou Commodity Price Information Center of GAC information on industry-wide negotiated prices for

those export products subject to price review, in both soft copy (in required format) and hard copy; in addition, each chamber shall file the name of personnel responsible for price review, addresses, telephone and fax numbers with the Foreign Trade Department of MOFTEC, the Duty Collection and Administration Department and Guangzhou Commodity Price Information Center of GAC.

4. The relevant chambers of import and export shall follow the PVC procedures pursuant to the Provisional Rules on Export Price Verification and Chop for Key Products subject to Price Review, which Rules were issued together with the Notice of the Rules on Price Reviews of Export Products by the Customs ([1997] MOFTEC GUAN ZONG HAN ZI No. 21). The adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline. The PVC procedures shall be performed in a way that it could assist in maintaining good export order on the one hand and effectively reduce the export costs of enterprises, promoting the development of the industries and exports. From 2002, each relevant chamber shall learn from the experience of the Chamber of Machinery and Electronic Products in implementing classified PVC for binoculars, and select at least one of the products with the jurisdiction of its chamber for trial.

5. Given the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination groups) and filing with GAC.

6. The adjusted catalogue of export products subject to price review shall become effective from May 1, 2002. The

Notice for Adjusting the Catalogue of Export Products Subject to Customs Price Review ([2000] MOFTEC GUAN FA No. 661) jointly issued by MOFTEC and GAC on December 25, 2000 shall become void then.

2003 ANNOUNCEMENT OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, GENERAL ADMINISTRATION OF CUSTOMS OF THE PEOPLE'S REPUBLIC OF CHINA, DATED NOVEMBER 29, 2003, EFFECTIVE JANUARY 1, 2004

Announcement of Ministry of Commerce of the People's Republic of China, General Administration of Customs of the People's Republic of China (No. 36, 2003)

According to the relevant provisions of *the Foreign Trade Law of the People's Republic of China*, in order to maintain the order of foreign trade and create a fair trade environment and in response to the demands of the industries engaging in export and import, as well as on the basis of the coordination by relevant industrial associations, starting from January 1, 2004, the export of citric acid and 35 other commodities (please refer to Exhibit 1: Catalogue of Export Commodities Subject to the Verification and Chop System, hereinafter the "Catalogue") shall be subject to the Verification and Chop ("V&C") system on an experimental basis. The Catalogue shall be subject to further adjustment and announcement by the Ministry of Commerce in consultation with the General Administration of Customs, upon application of the relevant Chambers of Commerce and according to the development of various industries.

With respect to those included in the Catalogue, if the commodities are exported under general trade, processing trade with customer's materials, processing trade with self-sourced materials and processing trade with exported materials, the exporters shall declare to the Customs with export contracts affixed with the V&C

chop by the relevant Chambers of Commerce for Import and Export. The Customs shall not accept any application for export when the export contracts are not affixed with such chop. The commodity number shall be the basis for the Customs to verify export contracts with V&C chop, while the commodity name works only as a reference.

Each Chamber of Commerce for Import and Export shall follow the principle of facilitating export activities and promoting industrial development, and strictly observe the Procedures for Implementing the Verification and Chop System on Export Commodities (Exhibit 2).

Enterprises exporting by forging the V&C chop on the contracts will be punished by the Customs and Chambers of Commerce according to relevant rules.

We hereby make this announcement.

Exhibits:

1. Catalogue for Export Commodities Subject to the Verification and Chop System
2. Procedures for Implementing the Verification and Chop System on Export Commodities
3. Contact Persons of the Chambers Responsible for Implementing the Verification and Chop System

Ministry of Commerce of the People's Republic of China

General Administration of Customs of the People's Republic of China

November 29, 2003

Exhibit 1: Catalogue of Export Commodities Subject to the Verification and Chop System

(Omitted.)

Exhibit 2: Procedures for Implementing the Verification and Chop System on Export Commodities

China Chamber of Commerce for Import and Export of Light Industrial Products and Arts-Crafts, China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, China Chamber of Commerce for Import and Export of Foodstuffs, Native Produce And Animal By-Products, China Chamber of Commerce for Import & Export of Machinery & Electronic Products, China Chamber of Commerce of Medicines & Health Products Importers & Exporters and China Chamber of Commerce for Import & Export of Textiles (collectively "Chambers") shall be responsible for implementing the verification and chop system (hereinafter "V&C") on export commodities. The procedures are set forth as follows:

A. For the commodities included in the Catalogue of Export Commodities Subject to the Verification and Chop System (hereinafter the "Catalogue"), exporters shall deliver or fax (in urgent cases) the export contracts (or copies thereof) to the relevant Chambers for verification before Customs declaration. If it is verified that the contracts comply [with the relevant regulations and industry agreements], the Chambers shall fill in the Verification and Chop Form of China Chamber of Commerce for [*] (hereinafter "V&C Form") and affix the counter-forgery V&C chop at the designated block of the V&C Form and to the export contracts at the blocks where

the prices and quantities are specified, and then deliver them back to the exporters. The exporters shall declare to the Customs with the originals of the V&C Forms and the export contracts that have been verified and affixed with the V&C chop by the Chambers.

B. For contracts where exports will be in several batches, exporters may apply to the Chambers for V&C of the whole contracts. After the Chambers have verified that the quantities and prices of each batch comply with the relevant batch contracts, the Chambers shall use the same serial number on the V&C Forms for all the batches of exports.

C. The Chambers shall verify the submissions by the exporters based on the industry agreements and in accordance with the relevant regulations promulgated by the Ministry of Commerce ("MOFCOM") and the General Administration of Customs ("GAC"). For commodities of special standards or brands that are not included in the industry agreements of the relevant Chambers, the Chambers may refer to the same or similar types of commodities manufactured and exported during the same period of time. The relevant Chambers shall file the industry agreements with MOFCOM and GAC within 10 days after the public announcements [for such industry agreements] are made, and any modifications to such industry agreements shall be filed with MOFCOM and GAC within 10 days after such modifications are made.

D. The Chambers shall promptly verify the exporters' submissions, affix V&C chop to the conforming applications and deliver them back to the applicant enterprises via express mail within 3 business days (as per postmark). The Chambers shall not affix the V&C chop to non-conforming export contracts and shall notify the exporters within 2

business days. In the event that no response is received from the Chambers 10 days after the exporters have submitted the export contracts to the Cambers for V&C, such exporters shall report the same to MOFCOM.

E. The Chambers shall establish a V&C administration system, and report to MOFCOM and GAC every three months the implementation of the V&C system for the commodities included in the Catalogue of the passing quarter.

F. The Chambers shall not charge any fees other than the necessary documentation costs involved in the verification of export contracts that are subject to the V&C system. For V&C applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters.

G. The Chambers shall keep confidential the exporters' submissions, and shall not willfully disclose such submissions.

H. For V&C related inquiries, the first person being inquired shall be responsible for giving responses. When being inquired by the Customs relating to the V&C, the contact persons of the Chambers (as listed in Exhibit 3) shall reply within 24 hours.

Exhibit 3: Contact Persons of the Chambers Responsible for Implementing the Verification and Chop System

(Omitted.)

SELECTED EXHIBITS TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, FILED SEPTEMBER 22, 2006

EXCERPT FROM THE CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS INFORMATION WEBSITE

[See source for logo] www.cccmhpie.org.cn	China Chamber of Commerce of Medicines and Health Products Importers and Exporters Information Website

Home	Overview of the Chamber of Commerce	Board Member Organizations	Membership Information	Online Exhibition	On-line FAQ	Contact Us

Information Department	Department of Traditional Chinese Medicine	Department of Western Medicine	Membership Department	Exhibition Department	Legal Department	Office

Concerns remain while good news on our country's vitamin C exports

——————————[Search]	China is the largest vitamin C producer and exporter in the world. Vitamin C is the largest type of western medicine-ingredient produced by China. The two-step fermentation method invented in our country is on par with international level. In recent years, the recovery rate of vitamin C from sorbitol has been improved to over 60% from 48%, thus significantly increase the Chinese market share

	of vitamin C on the world market. Currently, the annual vitamin C consumption on the international market is around 80,000 tons, and our country exports about 43,000 tons a year.
——————>> ICQ Service]	Currently there is a tripartite confrontation on the international market, with BASF AG of Germany, F. Hoffmann-La Roche of Switzerland and the four major Chinese vitamin C manufacturers competing against each other.
Receive ID _____ Concerns remain while there is good news about our country's vitamin C exports Send Code_____ Password_____	Between May 2000 and late December 2001, vitamin C in our country experienced the second "price war" since 1995 export prices plummeted from 5.0 US Dollars to less than 2.8 US Dollars; which has caused direct economic losses about 200 million US dollars. Relevant countries are ready to launch their anti-dumping lawsuits against China soon.

Confirmation _____4960 Deliver Register	In December 2001, through efforts by the Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, each domestic manufacturers were able to reach a self-regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports, to achieve the goal of stabilization while raising export prices. Such self-restraint measures, mainly based on "restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically" have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention. Beginning on May 1, 2002, vitamin C was listed as a product requiring price reviews by China's Customs and a seal of pre-approval by the China Chamber of Commerce, which has provided powerful oversight and safeguards for the implementation of self-restraint agreements among domestic manufacturers.

	Through the work of the Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters during the past year, and due to products discontinuation or reduction by foreign multi-national firms such as BASF Takeda, Merck and F. Hoffmann-La Roche of the United States, export prices of vitamin C have increased to over 3.35 US Dollars from 2.80 US Dollars in late 2001. Currently, the actual quotes have reached about 10.00 US Dollars. According to Custom's statistics, our country's vitamin C exports reached 146 million US Dollars in 2002, taking up 4.9% of exports on western medicine-ingredient by our country, which has created an unprecedented good atmosphere for domestic vitamin C business. According to estimates, every 10 cents in US Dollar increases in the vitamin C export will generate earnings of nearly 4 million US Dollars for the entire industry. If the export price of 2.80 US Dollars prior to the industry self-restraint is used as the base number, in 2002, earnings from our domestic vitamin C exports in 2002 increased by about 20 million US Dollars.

	The current good situation for the vitamin C exports has been hard-won and is the result of the short-term general intersection of different factors. Currently, abnormal export price increases may stimulate new manufacturing enterprises to join the competition. In the meantime, we expect that the supply of vitamin C will soon exceed demand when foreign multi-national firms resume their production. This will lead to a reduction or precipitous drop in profits from vitamin C, or even negative profits for certain domestic enterprises. Regarding the current export situation for vitamin C, we must remain clear-minded, as we faced so much experiences and lessons from the past. The manufacturing enterprises must remain cool-headed and soundly judge the situation of vitamin C on the international market, and make joint efforts with the China Chamber of Commerce of Medicines and Health Products, to avoid vicissitudes in the production and exports of vitamin C, for maintaining a stable, health situation for it for the long run. (Department of Western Medicine) Print this page Recommend to a friend

MINUTES OF THE FEBRUARY 26, 2004 PARACETAMOL SUBCOMMITTEE MEETING, DATED MARCH 9, 2004

www.cccmhpie.org.cn

Document dated: March 09, 2004

Minutes of the Paracetamol Sub-committee Meeting

The 2nd meeting of the Paracetamol Sub-committee pioneer year of Director-council convened on February 26, 2004 in Hangzhou. Management representatives from the following 7 companies attending the meeting:

1. Zhejiang Conler Pharmaceutical Co., Ltd[1]
2. Huzhou Konch Pharmaceutical Co., Ltd[2]
3. Changshu Huagang Pharmaceutical Co., Ltd[3]
4. Anhui Bayi Chemical Company[4]
5. Anwei Topsun Pharmaceutical Manufacturing Co., Ltd. under the Topsun Group[5]
6. Shenzheng Zhonglian Medicines Trading Co., Ltd
7. China Jiangsu International Economical Cooperation Company.[6]

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1. Zhejiang Conler website : www.conlerpharm.com

2. Konch Pharmaceutical website : www.hzkonch.com

3. Huagang Pharmaceutical website : www.huagang-pharm.com

4. Anhui Bayi Chemical Co., website : www.bengbu.gov.cn/zdqy/bbby/1.htm

5. Anhui Topsun Group website : (www.topsun.com)

6. China Jiangsu International Economic Company website: www.china-labor.net/qyjs/list.asp?companyid=571)

Representative from one management unit was absent. Vice Chair-person of the CCCMHPIE Mr. Zhang Changxin, Director of Western Medicine Division Mr. Qao Haili and other representatives from the Chamber of Commerce also attended the meeting.

Attendees reflected that the price of Acetaminophen, the main raw material of Paracetamol has increased more than 20% since last September till now. This month, it has surpassed the 17,000 yuan/ton, resulting in the corresponding increase on the marginal profit and manufacturing cost of Paracetamol. The export tax rebate has also reduced by 4 percentage points, adding onto cost of export. In overseas, India and other countries are actively purchasing Acetaminophen to resume their productions of Paracetamol, which is posing a very large threat to China's Paracetamol export. The industry is currently facing these internal difficulties and external threats. Attendees fervently indicated their wish to use the example of the Vitamin C Industry Self-regulation as management model to improve the export situation of Paracetamol.

In reply to this, the Chamber of Commerce Vice Chairman Mr. Zhang Changxin indicated that certain China products such as Vitamin C are leading the dominant position in the international market as all aspects of the products have been developed and matured whereas Paracetamol is still changing. Although China is considered a major Paracetamol exporter in the global market, competition among companies is still very aggressive. It is possible to achieve certain beneficial results via industry self-regulation at this stage. This

Sub-Committee is a very effective form of organizational method, without the Sub-Committee it is difficult to achieve resolutions and consensus. Formation of the Sub-committee is to lay down the foundation for industry self-regulation. The function of the chamber of commerce is to coordinate, organize and bring the companies together via certain means to ensure the effective progress of self-regulation. The articles of association are a very good resource that should be put into use. Through the enforcement of the articles of association, consensus within the industry can be established and thus achieve the goal of industry self-regulation. The core of self-regulation is to collectively build an automatic mechanism that will adjust the market, not necessarily reduces the output. Establishing the mechanism for self-regulation is a gradual process, it is not possible to reach the goal in one giant step. First, the consensus for self-regulation has to be established, follow by gradual actualization of the self-regulation. Fixing the lowest selling price in the industry is just one of the methods, the key is how to push up the price with joint effort.

REPORT ON HENAN XINXIANG HUAXING PHARMACEUTICALS' REFUSAL TO COMPLY WITH THE INDUSTRY'S SELF-REGULATION AGREEMENT, DATED DECEMBER 5, 2003

www.cccmhpie.org.cn

China Chamber of Commerce of Medicines & Health Products Importers & Exporters Information Website.

(Document dated December 5, 2003.)

Report on Henan Xinxiang Hoaxing Pharmaceuticals'[1] Refusal to Comply with the Industry's Self-Regulation Agreement[2]

India is a major export market for China's Penicillin Industrial Salts, and accounts for 70% - 75% of all exports. Since May 2003, the export volume of Penicillin Industrial Salts has been increasing rapidly, and the export price has continued to fall. Not only has the fall in the export price affected the economic benefits of the various Penicillin Industrial Salts manufacturers, but it has also caused many negative repercussions relating to the implementation of safety protection measures on the import of China's Penicillin being considered by the government of India.

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1. Henan Xinxiang Huaxing Pharmaceuticals, aka Hua Xing Medicines Factory, is located in Xinxiang city of Henan province in the central part of China. Website: http://www.xxhx.com.cn

2. Penicillin Industrial Salt- the common form that is used in the industry is a powder form, known as Penicillin G Potassium First Crystal, industrial standard- USP25. (abbrev. Penicillin G)

In response to the requests of various enterprises to protect India's national and entrepreneurial interests as well as to protect the Indian market, the Chamber of Commerce convened the Penicillin discussion forum on July 31, 2003 and the Penicillin Manufacturers' Summit on September 29, 2003. Both meetings studied and discussed the implementation and enforcement of industry self-regulation, and the cooperative negotiations were able to reach a common agreement.

The following manufacturers signed the "China Penicillin Industrial Salt Manufacturers' Agreement on Self-Regulation" and pledged to carry out the content set forth in the agreement:

1. North China Pharmaceutical Group Co., Ltd. (www.ncpc.com)
2. Sichuan Pharmaceutical Ltd. Company
3. Hayao Pharmaceutical Group Main Factory (http://www.hayaozong.com.cn)
4. Shandong Lukang Pharmaceutical Group (http://www.lkpc.com)
5. Zhangjiakuo Pharmaceutical Main Factory
6. Hebei Zhongnuo Pharmaceutical (Shijiazhuang) Co., Ltd (http://www.znpc.cn)
7. Henan Xinxiang Huaxin Pharmaceutical Company (http://www.xxhx.com.cn)
8. Jiangxi Dongfeng Pharmaceutical Ltd. Company (http://www.jxdfp.com)

9. Huacheng Pharmaceutical Plant (a subsidiary of North China Pharmaceutical Group)

They all expressed their commitment to comply with the terms of the agreement. In addition, Tangshan Huaqing Biochemical Pharmaceutical Co., Ltd. (http://www.hqyaoye.com), a foreign enterprise that has very little production of Penicillin, took the initiative to send a representative to the Chamber of Commerce, requesting to be included in the industry's self-regulatory affairs. All the above mentioned manufacturers represented the complete production volume of the nation's Penicillin industrial salt. It was the first ever conference of the entire Penicillin industry.

After having signed the agreement, however, the largest exporter, Henan Xinxiang Huaxin Pharmaceutical, refused to comply with the content of the agreement. Within the first month of the implementation of self-regulation (in October), Henan Xinxiang Huaxin Pharmaceutical broke the export quota of 138.16 tons.

Upon the request of various companies, the Chamber of Commerce convened another discussion forum on December 2, 2003. Due to Henan Xinxiang Huaxin's non-compliance, the meeting was unable to establish a consensus to continue with the industry's self-regulation policy, and the "China Penicillin Industrial Salt Manufacturers' Agreement on Self-Regulation" was forced to be aborted. Both the Chamber of Commerce and the general Penicillin manufacturers are reluctant to see the abortion of self-regulation, as its negative repercussions would greatly increase the probability

that India would enforce "Safeguard"[3] measures on the nation's Penicillin Industrial Salt. Once the "Safeguard" measures are implemented, the effect on the nation's Penicillin manufacturing industry would be destructive.

Henan Huaxin has undeniable responsibility for willfully acting in its own self-interest--to the detriment of the industry as well as national interests. Nevertheless, we still hope that Henan Huaxin will consider the bigger picture, return to the path of industry self-regulation as soon as possible and help realize a "win-win" situation for all.

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3. Refers to the WTO Agreement on Safeguards. A WTO member may restrict imports of a product temporarily (take "Safeguard" actions) if its domestic industry is injured or threatened with injury caused by a surge in imports. Here, the injury has to be serious. Safeguard measures were always available under GATT (Article 19).

DECLARATION OF PROFESSOR JAMES V. FEINERMAN, DATED AUGUST 15, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MDL. No. 1738

CLASS ACTION

IN RE VITAMIN C ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

DECLARATION OF PROFESSOR JAMES V. FEINERMAN

I. Introduction

1. I am the James M. Morita Professor of Asian Legal Studies at Georgetown University Law Center and have been admitted as an attorney to practice before the courts of New York. Among other courses, I teach a course in Chinese Law. I have taught at Georgetown, and also as a visitor at Harvard and Yale Law Schools, for over twenty years.

2. In addition to my work as a Professor of Law, I served as Editor-in-Chief of the *China Law Reporter,* a publication of the American Bar Association's Section of International Law and Practice, from 1986-1998; as Chair of the Committee on Legal Education Exchange with China, from 1993-1997; as Chair of the Asia Law Forum, of the Association for Asian Studies, from 1991-1996; as a Trustee of the Lingnan Foundation from 1994-2003; and am currently a Trustee of the Yale-China

Association. From 1993-1995, I served as Director of the Committee on Scholarly Communication with China, Washington, D.C., the national organization sponsoring official academic exchange between the United States and China, sponsored by the National Academy of Sciences, the American Council of Learned Societies and the Social Science Research Council. From 1983-1985, I served as Administrative Director and Fellow of the East Asian Legal Studies Program at Harvard Law School, Cambridge, Massachusetts. In 1982-83, I taught as a Fulbright Lecturer on Law at the Peking University Law Department, Peking, and taught at Tsinghua University Law Faculty from February to June, 2006. My curriculum vitae is attached.

3. I have been retained as an expert on Chinese law to examine and review the exhibits provided by the Ministry of Commerce of the People's Republic of China, and to determine whether the exhibits support the defendants' contention that the conduct complained of was compelled by the government of China.

4. I have reviewed the Complaint, defendants' motion to dismiss, the amicus curiae brief of the Ministry of Commerce of the People's Republic of China in support of defendants' motion to dismiss and its exhibits. In addition, I have relied on my own knowledge of Chinese law and regulations and my own study of the Chinese legal system and have also consulted relevant Chinese law and secondary legal materials.

5. Based on my review, it is my opinion that defendants' conduct as alleged in the Complaint was not compelled as a matter of Chinese law.

II. Analysis

6. The Chinese versions of regulations, rules and inferior legal enactments submitted along with English translations as exhibits to the Declaration of Joel M. Mitnick, are, in most cases, not copies of verified and chopped legal documents on file with a relevant governmental entity responsible for its administration. Instead, exhibits C, D, H, J and K are taken from websites or collections. As a result, those exhibits cannot, on the face of the documents, be verified as the law then in force. In China, the chain of custody and transmission of documents usually is illustrated by a combination of a signature and an official seal or "chop" (which, in the original, would have been done with red ink). Documents lacking the verified seal or chop would not be considered authoritative in China.

7. In the above cases the notarial certificates attached to the exhibits merely certify the accuracy of the English translation and/or the authority of the ministry representative who has affixed his or her signature on the English translation.

8. The following is my analysis of each exhibit attached to the Mitnick declaration.

9. Exhibit A and B to the Mitnick declaration are not Chinese law and do not relate to Chinese law.

10. Exhibit C to the Mitnick declaration is neither a government law nor a regulation. The "regulation" contained therein is the articles of association adopted by the China Chamber of Commerce of Medicines & Health Products Importers and Exporters (the "Chamber"), which is not a governmental entity. The rest of the

document contains a brochure advertising the Chamber. Moreover, the "regulation" attached to the Mitnick declaration does not contain a chop.

11. Exhibit D to the Mitnick declaration contains the Measures for Social Organization for MOFTEC ("Measures"), which is the predecessor to MOFCOM. In the Chinese legal hierarchy, "measures" are enacted pursuant to regulations, which are in turn created pursuant to an enabling law.

12. Article 4 of the Measures establishes that MOFTEC has merely an administrative role with respect to foreign trade and economic organizations. Articles 12 and 13 make clear that MOFTEC's role is one of overall operational guidance particularly with respect to formation and reporting. Articles 15 and 16 delineate the daily management and functions of MOFTEC as supervising the establishment of organizations and the selection of personnel, providing oversight of budgets (including salaries and benefit plans) and of participation in civic projects (such as blood drives and tree planting). Articles 19 and 20 provide for a supervisory and inspection role on the part of MOFTEC with regard to a very limited number of functions: (1) implementing higher level laws; (2) following their own articles of association; and (3) the expenditure of funds. These supervisory and inspection functions do not contemplate compulsion of its organizations or their members and nowhere require behavior such as that alleged by plaintiffs.

13. These Measures do not compel price-fixing behavior and nothing in them explains how such behavior could be compelled pursuant to these measures. Even if they did, the Measures themselves do not indicate whether

MOFTEC ever exercised any authority to compel price-fixing conduct. In any event, these Measures, promulgated in 1991, could not at the time of their promulgation compel conduct that did not begin until ten years after their promulgation. Moreover, the Measures do not contain a chop.

14. Furthermore, nothing in the "regulation" contained in Exhibit C, purporting to establish the Chamber, indicates that the "regulation" was enacted pursuant to these Measures. But the "regulation" was enacted in 2001, ten years after the adoption of the Measures.

15. The "Notice of Ministry of Foreign Trade and Economic Cooperation" attached to the Mitnick declaration as Exhibit E concerns personnel management and was issued pursuant to the Foreign Trade Law and relevant State Council regulations. It does not purport either to fix prices or to compel price fixing behavior.

16. Exhibit F to the Mitnick declaration is an approval of the establishment of the vitamin C subcommittee dated March 23, 1998. It acknowledges receipt of a document requesting the establishment the subcommittee and approves the request. As such, it only authorizes the creation of the entity. This reflects the reality in China that an organization not expressly allowed would be prohibited, in contrast to the long-standing Western norm that anything not expressly prohibited is allowed. By itself it does not authorize anything but merely restates the "responsibilities" detailed in the request for establishment.

17. Exhibit G to the Mitnick declaration, the Charter of the Vitamin C Sub-Committee, is the charter of a non-governmental organization and is not a law or

regulation of the Chinese government. It asserts in Article 1 that it is constituted in accordance with Chinese law and regulations but there is no indication that any governmental entity approved this charter. It is signed only by the person who purports to be the director of the legal affairs department of the Chamber itself, which is a social organization and not a governmental entity. There is no indication that it was filed with or required by any higher level or governmental entity.

18. Exhibit H to the Mitnick declaration is a MOFTEC and SDA Notice of 1997, which became effective January 1, 1998. As noted on the face of the exhibit itself, the Notice was abolished effective March 21, 2002, the day before the formation of the Chamber as demonstrated in Exhibit C, by the *List of 26 Abolished Ministerial Regulations of the Fourth Batch by Ministry of Foreign Trade and Economic Cooperation.* The "strict control" of the scale of Vitamin C production as set forth in Article 1 of that Notice violated China's obligations under the General Agreement on Tariffs and Trade ("GATT") as a member of the World Trade Organization ("WTO"). The preamble of the Notice stated that its purpose was to: "rectify the operation order and optimize the operational team of Vitamin C export, ... improve the competitiveness of our Vitamin C products in the international market, promote the healthy development of Vitamin C export and maintain the interest of our country and enterprises ...." Thus, this Notice was a violation of WTO and GATT rules, a restriction on international trade, and was repealed.

19. Moreover, the Chinese version of the exhibit cannot be the document as originally filed with MOFTEC because it contains both the notice of its abolition in 2002 and an indication that it was downloaded from a website that did

not exist in 1997. In addition, I note that the document contains a notarial certificate about its translation and the authenticity of its translation but does not contain a chop.

20. Exhibit I to the Mitnick declaration contains the interim regulations of the Ministry of Foreign Trade and Economic Cooperation promulgated in 1996, which address punishment for "lower than normal" export pricing. These are general regulations that do not address vitamin C. Article 5 of the regulations defines "lower than normal price" as meaning that the export price is lower than the necessary price for the product of the enterprise. These regulations do not compel the price-fixing alleged by plaintiffs.

21. Exhibit J to the Mitnick declaration is a MOFTEC & Customs Notice adjusting the catalogue of export product subject to price review by customs in light of China's WTO obligations. The Chinese original is a print-out from a website. The translation provided states that the Notice became effective May 1, 2005. The actions described by the notice are to be taken by the non-governmental Chambers of Commerce. The Chambers of Commerce in tum notify MOFTEC and Customs of their action. Nothing in the Notice compels the price-fixing alleged by plaintiffs.

22. I reviewed the language in Exhibit J, paragraph 4, which states "[t]he adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline," because the translation was ambiguous. What was translated as "shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline" should more accurately be translated as follows: "should benefit the chambers

while being conducive for their coordination of prices and enterprise self-regulation." The language of the document thus refers to the autonomy of the chambers in price setting and administering their own affairs. Moreover, in paragraph 5 of Exhibit J, the Notice states that "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products" based solely on approval by the subchamber and the filing of a report.

23. The Chinese original of Exhibit K to the Mitnick declaration was also printed from a website and is no more than an announcement of MOFCOM and the Customs Administration enjoining the Chambers to facilitate export activities and to observe the procedures for implementing the verification and chop system. The translation provided suggests in paragraph A to exhibit 2 that the verification and chop process requires compliance with "relevant regulations and industry agreements." This does not correspond with anything in the Chinese original, which references only verifying correspondence with the export contracts. In the announcement itself, the only legal sanction threatened is punishment by customs and the Chambers of Commerce for forging the V & C chop. There is no requirement for any participation in an industrywide agreement with regard to price.

Affirmed

/s/_____

Professor James Feinerman

Dated: August 15, 206

SELECTED EXHIBITS FROM THE SUMMARY-JUDGMENT RECORD BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SELECTED EXHIBITS TO THE DECLARATION OF ANNABELLE CHAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF FOREIGN LAW AND ENTRY OF JUDGMENT PURSUANT TO RULE 44.1, FED. R. CIV. P., FILED NOVEMBER 23, 2009

LETTER FROM JOEL M. MITNICK TO THE HONORABLE JAMES ORENSTEIN, MAGISTRATE JUDGE FOR THE EASTERN DISTRICT OF NEW YORK, FILED SEPTEMBER 29, 2008

September 29, 2008

FILED BY ECF

COURTESY COPY BY HAND

The Honorable James Orenstein

United States District Court

Eastern District of New York

225 Cadman Plaza East

Brooklyn, New York 11201

Re: *In re: Vitamin C Antitrust Litigation*, MDL No. 1738

Dear Judge Orenstein:

I have read the transcript of the hearing held in this matter before you on September 10, 2008 and Your Honor's docket Minute Entry of the same date. On behalf of my client, the Ministry of Commerce of the People's Republic of China, I write to address an issue that was raised at the hearing.

In both their written submission with respect to the pending motion to compel and at the hearing, plaintiffs suggested that the fact of the Ministry's common interest with the defendants somehow disqualifies the Ministry as an *amicus*[1]. *See, e.g.*, Transcript of Hearing before Hon.

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1. At the Ministry's first appearance in this litigation, I identified that the Ministry had two interests in this litigation, one that the Ministry had in common with the defendants and one that was an independent interest of the Ministry. With respect to the common interest, I stated that the Ministry desired to present its views as a foreign sovereign of the regulatory framework governing these specific defendants in order to "present[ ] the predicates for what Mr. Bomse [one of defense counsel] and others have described as a foreign sovereign compulsion defense." (Transcript of hearing before Hon. James Orenstein, May 3, 2006, at 38.) As stated more recently, "by challenging the compelled conduct, the plaintiffs in essence challenge under US antitrust law the Chinese government's right to compel compliance by its own corporate citizens, and solely within its borders, of a pricing regime designed by the Chinese government for the purpose of maintaining an orderly export market." Letter of J. Mitnick to Hon. James Orenstein, dated August 29, 2008. It should, therefore, come as no surprise that the Ministry and the defendants have coordinated their strategies in connection with their

James Orenstein, September 10, 2008, at 36 ("[the Ministry has] taken the position as an amicus which traditionally is an impartial friend of the Court."). Yet the Ministry has explained from the outset that it sought the form of *amicus* status only because, "[s]ince 1978, the U.S. government has encouraged foreign governments to present their views concerning pending judicial proceedings directly to the U.S. courts, and the U.S. Solicitor General has taken the position that a foreign government's submission of its views in the form of an amicus curiae brief should be 'dispositive.'" Brief of Amicus Curiae, the Ministry of Commerce, in Support of Motion to Dismiss, at 1-2, citations to supporting authority omitted; *see, also,* Application [to Judge Trager] for Permission to File a Brief Amicus Curiae at 2; transcript of hearing before Hon. James Orenstein, May 3, 2006, at 40-41. Accordingly, the Ministry's appearance in this proceeding to express the views of a foreign sovereign, even an interested foreign sovereign (as would be the case in *all* foreign sovereign compulsion cases), is procedurally proper.

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common interest in having the complaint dismissed. *See, e.g.,* Letter of Richard S. Goldstein to Hon. David G. Trager, dated June 26, 2006 (informing Judge Trager in advance of defendants' knowledge that the Chinese government would seek permission to submit an *amicus* brief on defendants' behalf). In addition, I articulated an interest in the litigation that the Ministry held independently of the defendants. "The government very much would like to be able to assist the Court in establishing the principle that these specific kinds of Chinese laws resulted in compelled conduct that created an immunity from antitrust law. The Chinese government's interest in having the Court hear that view and establish that principle is completely independent of the defendants' interest in having themselves released from the case." (*Id.* at 43-44.)

The Ministry would again like to express its appreciation to the Court for granting it permission to submit a brief letter statement in connection with the pending motion to compel. Although the Ministry did not seek permission to argue at the hearing, it would, of course, be pleased to entertain any request by the Court for further assistance.

Respectfully submitted,

/s/_____

Joel M. Mitnick

Counsel for *Amicus* The Ministry of Commerce of the People's Republic of China

STATEMENT IN *IN RE VITAMIN C ANTITRUST LITIGATION* OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, DATED JUNE 9, 2008

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

STATEMENT IN *IN RE* VITAMIN C ANTITRUST LITIGATION

June 9, 2008

Introduction

Amicus The Ministry of Commerce of the People's Republic of China (the "Ministry") authorizes its Department of Treaty and Law to respectfully submit this Statement (together with an authorized English translation) in response to plaintiffs' April 24, 2008 Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss ("Supplemental Opposition"). At the outset, the Ministry would like to express its continuing appreciation to this Court for permitting the Ministry to submit to the Court the official views of the People's Republic of China.

The Ministry would also like to take this opportunity to ratify the *amicus* filing that was submitted previously on its behalf. Although in filing that brief the Ministry followed the procedures advised by the U.S. State Department with respect to the preferred method by

which a foreign government should make its views known to a U.S. court, the Ministry wants the Court to know that it participated actively in the drafting of that brief, which was reviewed and edited word-for-word in Beijing by officials of the Ministry and the U.S. counsel engaged by the Ministry. That brief accurately sets forth the views and understandings of certain PRC government agencies, serving as an official view on behalf of the Ministry. The Ministry's U.S. counsel, acting within the scope of its authorization, submitted relevant documents to this Court on behalf of the Ministry in line with U.S. law and applicable procedures. The Ministry will assume the Court's familiarity with the contents of its *amicus* brief and will not repeat the facts or arguments it contains.

The Regulatory Regime

The Supplemental Opposition reflects a misunderstanding of the nature of the PRC government's regulation of the vitamin C industry that the Ministry's initial *amicus* brief was intended to dispel. Throughout their submission, plaintiffs trivialize China's organs of regulations where those organs differ in structure or function from ones more familiar to the plaintiffs.

As explained in the Ministry's *amicus* brief, the system of regulation the Ministry imposed on China's vitamin C export industry centered around a process not a price. The Ministry was careful to direct its U.S. counsel to explain to the Court that specific chambers of commerce, *when authorized by the Ministry to regulate*, act in the name, with the authority, and under the active supervision, of the Ministry. When acting in this manner, a chamber performs a governmental function so authorized under

Chinese law. In this case, the Ministry specifically charged the Chamber of Commerce of Medicines and Health Products Importers and Exporters (the "Chamber") with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export from China so as to maintain an orderly export.

In summary, the Ministry wishes that this Court would continue to trust and adopt the views contained in the *amicus* brief submitted by the Ministry, and support the Defendants' Motion to Dismiss.

Accordingly, the Chinese government respectfully submits that, to the extent the plaintiffs take issue with the Chinese government's sovereign actions over the conduct solely of its own citizens, that issue should not be addressed in the courts of the United States but rather through bilateral trade negotiations conducted by the executive branches of the respective sovereign nations involved consistent with recognized norms of international law and diplomacy.

Respectfully submitted,

Department of Treaty and Law
Ministry of Commerce of the
People's Republic of China

[affixed seal]

REPORT OF PROFESSOR SHEN SIBAO, DATED FEBRUARY 19, 2009

Dean and Professor of Law
University of International Business & Economics
Beijing, China

Dean
Law School of Shanghai University
Shanghai, China

I. INTRODUCTION

Summary of Credentials

1. I am a Professor of Law, a doctoral advisor and the Dean of the Law School of the University of International Business & Economics in Beijing, China, which is a leading law school in China with a special focus on international law and economic law. I also serve conjunctively as the Dean of the Law School of Shanghai University in Shanghai, China. I have taught several law courses, including in particular, courses on China's Foreign Trade Law, international commercial laws, and corporate investment law. I am a member of the Law Group of the Degree Commission of the State Council of China and the Social Science Commission of the Ministry of Education of China, a specially-invited advisor to China Council for the Promotion of International Trade, and the Chairman of China International Economic Law Studies Association.

2. I have been admitted as an attorney to practice law in China for twenty five years. I serve as a Special Advisor to the Supreme People's Court, a member of the Central Government Senior Officials Lecturer Group and the main speaker at the Central Legal System Seminar.

I have been a senior arbitrator and Vice Chairman at the China International Economic and Trade Arbitration Commission for ten years as well as an arbitrator at many other Chinese and international arbitration institutes including The Commercial Arbitration Chamber of Paris, the Korea International Commerce Arbitration Commission, and the London Grain and Feed Trade Association. I am also a mediator at the United Nations International Center for Settlement of Investment Disputes.

3. I have also studied extensively abroad and in the US. From 1981 to 1983, I was in the Parker School Program at Columbia University in Comparative Law. From 1999 to 2000, I was a visiting scholar on the Fulbright Program teaching at Brooklyn Law School. My curriculum vitae is attached hereto as Appendix A.

4. I have researched and written extensively on issues related to China's Foreign Trade Law, foreign trade issues and international economic trade dispute resolutions. I have also participated in the drafting and revision of the Foreign Trade Law, the Corporation Law and the Arbitration Law as well as regulations and administrative rules related to foreign trade issues. I have been a special counsel to the China Ministry of Commerce ("MOFCOM") previously known as the China Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") (both entities sometimes being collectively referred to as "MOFCOM") on various matters, and I am in charge of several research programs sponsored by the Department of Treaty and Law, Department of Foreign Trade, and Department of Trade in Services of the MOFCOM. A list of my publications is attached hereto as Appendix B.

Nature of Assignment

5. I have been retained by Defendants in this case as a Chinese legal expert to furnish this Report to explain the nature of the regulatory system that operated in China under the supervision of China Chamber of Commerce of Medicines and Health Products Importers & Exporters (the "Chamber") with authority delegated by MOFCOM, and that applied to the Defendants, as manufacturers of vitamin C throughout the period relevant to this litigation and to further consider whether certain public materials of the Chamber or documents referred to by the Plaintiffs and referenced by this Court are inconsistent either with this regulatory system or with Defendants having been obliged by the Chinese government to establish a coordinated pricing and output regime for vitamin C exported from China.

6. In undertaking this assignment, I have reviewed Plaintiffs' Third Amended Complaint, various papers submitted by both sides in connection with Defendants' Joint Motion to Dismiss including Memoranda of Law and Supporting Papers, the Amicus Curiae Brief of MOFCOM and supporting exhibits, the Supplemental Declaration of MOFCOM, the Declaration of Professor James V. Feinerman dated November 14, 2008 ("Feinerman Decl.") and this Court's November 6, 2008 Memorandum and Order. I have also reviewed documents produced by Defendants and deposition testimony taken of them, relevant Chinese laws, regulations and research literature, and have consulted with knowledgeable government officers regarding the Chinese export regulatory regime. My hourly rate is US$600.

Summary of Conclusions

7. Based on my experience and expertise, as above described, and the analysis that I have made of the facts regarding the regulation of vitamin C, the following is a summary of my conclusions, the basis for which will be set forth at length in the sections and paragraphs which thereafter follow:

8. Over approximately the past 30 years, China has been in the process of transforming its economy from a command economy, sometimes referred to as a "planned economy," in which the State controls entirely both domestic and international trade, to a modified market economy, referred to as a "socialist market economy" in which private enterprises are permitted to exist and operate for profit subject, however, to government control designed to cause certain important Chinese industries to operate in a coordinated fashion in order to insure their stability and further their profitability by avoiding what China regards as inappropriate forms of harmful competition that would impede the development of successful and profitable industries that China regards as being in its national interest as an emerging economic power in the world.

9. Consistent with this important national economic policy, vitamin C has, for many years, been regarded as a strategically important industry in China and has been subject to mandatory industry coordination in order to avoid what China considers to be "harmful" competition, thereby helping to promote the development of a strong export commerce in this area. Although the mechanisms that have been employed to ensure this coordination and overall national profitability have varied somewhat over time, as circumstances have changed, at all times vitamin C was a regulated commodity

with controls exerted over price and/or output in order to advance the national interest, as above described.

10. One of the principal ways in which China has implemented its regulatory interests in many critical areas of economic development is through the creation and operation of what are referred to as "China Chambers of Commerce for Import and Export" (the "Import and Export Chambers"). In the case of strategic industries, including vitamin C, these chambers represent the Chinese government in the sense that they are charged with enforcing government economic policy with respect to industries of concern. This role is reflected in various regulations and directives promulgated by MOFCOM. Companies that are subject to the oversight of the Import and Export Chambers are required to participate in the relevant chambers and are subject to their rules. A refusal to abide by such rules is subject to sanction, including loss of the right to export entirely.

11. In the case of vitamin C, the Defendants were at all times required to act in a coordinated fashion consistent with government economic policy and the national interest in avoiding harmful export competition. In reaching agreement as to specific actions, the parties were acting pursuant to a regulatory process that is well-understood and applied broadly in China, known as "self-discipline." That process, by design, involved communications among the relevant parties with a goal of seeking agreement on a unified course of action that would implement the mandatory goals of Chinese policy as I have described above. This approach was efficient in the sense that the companies involved in the industry were in the best position to know how to best implement the mandatory goals of Chinese national industrial policy.

12. It is important to understand that the mandatory policy goals themselves were neither subject to debate, nor could they be ignored. The policy of the government was mandatory and participation in the process designed to implement that policy was mandatory. Thus, at all times it was mandatory for companies subject to regulation under a regime of self-discipline to participate in the government's mandated process in order to further China's goals of avoiding harmful and destructive forms of competition. Furthermore, the Chamber regulating vitamin C operated in an active oversight fashion and was empowered to insure such cooperation. That fact is seen quite vividly in the fact that on almost all occasions when the Defendants in this case met to discuss price or output, it was under the auspices of, and with the direct participation of, the Chamber.

13. During at least some portions of the transitional period from a command to a socialist market economy, the Chinese government did not itself establish specific export prices or quotas as the means of carrying out its mandatory policies. Instead, as explained in the preceding paragraph, the Chinese government established the policy goals, created a mandatory process of regulation through the Chamber, and then required the vitamin C exporters to engage in that process with the goal of implementing the policy through their own interactions and self discipline, all under the supervision of the Chamber. In no way was participation in the process, or refusal to act in a manner consistent with China's national economic policy, "voluntary" in the sense that it could be ignored. The policy was mandatory as was participation in the process of coordination through the Chamber.

14. The Chinese regulation and supervision policy to which I refer has been in place since at least the mid-1980's as a function of basic governmental policy. It has applied based upon Chinese national economic goals adopted with respect to certain Chinese industries and economic sectors viewed as critical to China, regardless of the size or presence of those industries overseas, and regardless of their market power or lack thereof in an overseas context. To understand the regulation that has taken place since 2001, one must first understand the historical context, and how that regulation has developed and evolved over time. In the paragraphs which follow, I will describe the evolution, based in large part upon my personal experience, and on the facts and record in this case as furnished to me and informed by my expertise.

II. ANALYSIS

A. The China Legal System

15. Before turning to a more detailed discussion of the regulatory system as applied to vitamin C, I believe that it may be useful to provide some initial comments regarding the nature of the Chinese legal system and those characteristics of it that are a product of China's specific social and cultural history and environment. It is important to understand the nature of this legal system in evaluating the balance of this Report.

16. In China "law," in the sense of obligation that must be obeyed, comes from a variety of different sources. In very general terms, Chinese law begins with the Constitution which is the highest source of legal obligation. There then are laws promulgated by the National People's Congress Standing Committee, administrative rules and regulations formulated by the State Council (which is

China's Central Government[1]) and regulatory documents promulgated by individual ministries or departments (such as MOFCOM). It is normal for these types of law to be expressed at a level of generality that then must be applied and implemented in specific contexts.

17. That process occurs through decisions, notices, official minutes of meetings issued by the State Council, Government Ministries, and the like, that also have binding authority within their scope. Many official requirements are also transmitted through communications that may consist of department documents or oral directions, even including telephone calls. It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction. Regardless of form, to the extent that these directions come from people in superior authority they are no less binding and obligatory on subordinates and the companies than any other type of "law". This is a long-standing system in China as a way of thinking and acting that still exists in China even during its on-going transition to a more market-based economic system.

B. MOFCOM's Regulatory Role

18. MOFCOM is a component of the State Council and is the highest level of Chinese government administrative authority that regulates foreign and domestic trade. It has the authority to draft and implement trade related laws, regulations, policies and directives.[2] It may also issue its

1. "The State Council is the Central Government of the People's Republic of China and is the executive body of the highest organ of State power." Constitution of People's Republic of China, art. 85.

2. Such directives may appear in various forms of official documents issued by Chinese government departments such as

own regulations, rules, measures or instructions on trade issues, which it retains the full authority to interpret and apply, either directly or through delegation.

19. Most importantly, MOFCOM's interpretation of its own regulations and policies carries decisive weight under Chinese law.

20. As the State regulator of trade, MOFCOM may delegate some of its own administrative functions and authority to entities it oversees and manages. As set forth below, in this case it has delegated such administrative functions and authority to the Chamber. Thus, the Chamber in carrying out these delegated functions, acts in an official capacity.

C. China's Export Regulatory Reform and Policy of Coordinating Export to Advance National Interest

21. China's economic system has been developed through two stages, the stage of a planned economy and the stage of transition into a socialist market economy, which started in 1978 and which transition was formally announced in 1993. In the planned economy era (1949-1978), the Chinese government had a monopoly on foreign trade business in which MOFTEC had centralized control of foreign trade and allowed only designated specialized state-owned import and export companies to engage in foreign trade in accordance with mandatory State trade plans.

"Decision," "Notice," "Reply," and "Meeting Minutes." Official Documents Handling Measures of the State Administration, art. 9. They carry legal authority under Chinese law. *Id.*, art. 2 (the official documents (including telegraph) of the administrations are instruments with legal validity and standard format formed in the administrative process of the administrations, are important tools for administration by law and public functions.)

22. At the time there were eight main specialized import and export companies responsible for foreign trade in eight corresponding consortiums of industries: chemical industry, food stuffs, metal and minerals, textiles, native products and animal by-products, machinery and electronic products, light industries and equipment. Each designated specialized import and export company was a part of MOFTEC. The leaders of specialized companies were MOFTEC officials—they were appointed by MOFTEC, had corresponding government official rank and their personnel files were kept by the government. Profit and loss was calculated at the national level; there was no individual corporate accountability for profit and loss.

23. As explained in a seminal speech by then MOFTEC Minister Li Lanqing[3] at the Working Conference of National Economic System Reform, as China commenced to reform its political and economic systems and to open its doors and domestic markets to the outside in the mid-1980s, the government gradually released its central planning and direct control of individual companies' business activities. Instead, it began to rely on economic, legal and political measures, and adopted administrative means to control and supervise foreign trade on a macro-level to achieve national policy objectives.[4]

24. After decentralization and a relaxation of centralized controls, many Chinese companies had begun to engage in aggressive forms of competition without a

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3. Mr. Li served as Vice Minister of MOFTEC in 1986-1990, Minister of MOFTEC in 1990-1993, and Vice Premier of State Council in charge of foreign trade in 1993-2003.

4. Li Lanqing, *Problems of the Reform of 1988 Foreign Trade Regime*, published in Research of Macro Economy (1987), p.30.

great deal of careful planning or an appreciation of the consequences of their activities over the longer term. These companies ignored China's strong national interest in maintaining the long term stability and profitability of Chinese industries, and instead had exported at hugely discounted prices in a manner inconsistent with these national policy objectives.[5]

25. As observed by Minister Li, the foreign trade did not operate successfully when the government had centralized control, but it became chaotic when the government decentralized control.[6] At a national policy level China did not consider aggressive competition acceptable in the national interest and it therefore put in place new administrative controls to make sure that companies did not act without regard to broader state interests as they began to operate privately.

26. In implementing these controls, because government was no longer directly controlling individual companies' activities, addressing these issues necessarily required the government to delegate its regulatory functions to entities that could coordinate and regulate market competition for the purpose of advancing the national interest in ensuring that competition was orderly and conducted in a manner so as to assure industries were not exposed to foreign trade sanctions, and, in addition, earned economically appropriate returns consistent with state objectives to become a successful industrial nation on a global basis.

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5. *Id.*

6. *Id.*

27. The then MOFTEC Minister Wu Yi[7] summarized the situation the Chinese government was grappling with as follows, in a speech given in 1994:

> As import and export operation continue to open, more and more companies will engage in import and export trade. In particular after our country "reinstates its GATT membership," in the future the number of import and export commodities subject to the State's direct regulation will further decrease. However, our country's socialist market economy currently is still in a nascent stage. Many economic activities are not standardized. Some enterprises after their operational discretion has expanded have not formed their own mechanism enabling self-determination operation, the accountability for their profits or losses, self-discipline and self-development. The phenomenon of blind competition among domestic companies and disruption of market order is still notable in certain time periods.
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> For many years, this problem has needed urgent resolution but is not well settled yet. It has seriously affected the healthy development of our country's export trade and caused direct economic losses to the country. ...Therefore, we need to reform the chambers and make them

7. Madam Wu served as the Minister of MOFTEC in 1993-1998, Commissioner of State Council (Equivalent to Vice Premier of State Council) in 1998-2002, and Vice Premier of State Council in 2003-2008.

> to have the ability to carry out the heavy duty of coordination, guidance, consultation, and service ... In foreign trade operations, we need to greatly strengthen and perfect import and export coordination and service mechanisms, including strengthening and promoting the functions of Import and Export Chambers and other intermediaries. Certain government functions will be gradually reduced and be transferred to these Chambers.[8]

28. As noted above, since China's transition from the planned economy and decentralization of control on the right to conduct foreign trade, the Chinese government has always been concerned with maintaining "market order," which in its view would facilitate maintaining and promoting its national interest in developing successful and profitable national industries. The Chinese government is concerned that "excessive competition" or "malignant competition" engaged by Chinese companies against each other would place an entire Chinese industry's profitability and sustainability at risk and in the context of foreign trade would divert profit away from China.[9]

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8. *Minister Wu Yi's Comments on the Reform of Import and Export Chambers of Commerce,* Xu Guomin, Machinery Electronic Products Market (1994) Issue 10. Speeches by government officials, such as Minister Li and Minister Wu occupy a particular place in Chinese legislative and regulatory policy-making. Such speeches, on major topics of government policy, are intended to provide broad direction to other government officials and to the public and frequently serve as the basis for more specific legislation on the topic at issue.

9. *See, e.g.,* Owen, Sun and Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond,* 75 Antitrust L.J.

29. To address these concerns and to advance the national interest of developing successful domestic industries and ensuring overall national profitability, the Chinese government formulated an important national policy which requires Chinese exporting companies to "unite and act in unison in foreign trade."[10] This policy was an important objective of China's export trade reform and was stated in official directives, specifically, e.g.:

(1) Li Lanqing, the then minister of MOFTEC, stated in his speech at the Working Conference of National Economic System Reform[11]: "In consideration of the above major issues, the goals and direction of the reform are relatively clear. To reform foreign trade system is to implement individual accountability of profits and losses, release the control of [foreign trade] operation, strengthen regulation, unite in foreign trade and further develop foreign trade."[12] A main task in the 1988 foreign trade system reform was "to improve the administration of foreign trade and to implement the policy to unite and act in unison in foreign trade."[13] The establishment of import

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231, 249 (2008). *See also supra* note 8, *Minister Wu Yi's Comments on the Reform of Import and Export Chambers of Commerce,* Xu Guomin, Machinery Electronic Products Market (1994) Issue 10.

10. *See* "The State Council's Decision on Several Matters concerning Further Reforming and Perfecting the Foreign Trade System" issued in 1990, Guo Fa [1990] No. 70.

11. *See supra* note 4, p.31.

12. *See supra* note 4. p.31.

13. *See supra* note 4, p.36.

and export chambers of commerce was one of the specific measures to implement this task.[14]

(2) The "Provisions on Strengthening the Coordination and Regulation of Export Commodities" issued by MOFTEC in 1991 states that "strengthening the coordination and regulation of export commodities aims to implement the policy of rectifying and improving [export] and furthering reform policy, to put into full play major export channels, motivate various foreign trade companies, to unite and act in unison in foreign trade, and to build a healthy foreign trade operation order so as to expand export, enhance economic efficiency and safeguard the nation's overall interest."[15] The Provisions authorized the designated foreign trade companies and Import and Export Chambers to conduct coordination and regulation and to implement the policy of acting in unity in foreign trade.

(3) "The State Council's Decision on Several Matters concerning Further Reforming and Perfecting the Foreign Trade System" issued in 1990, provides that one major task of carrying out further reform is to "improve export operation, strengthen coordination and regulation, and to unite and act in unison in foreign trade."[16]

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14. *Id.*

15. Provisions on Strengthening the Coordination of Export Commodities, MOFTEC, 1991, para. 1.

16. Decision on Several Matters concerning Further Reforming and Perfecting the Foreign Trade System, State

30. In sum, the clear policy of China during the past decades, and continuing until today is that there should be private enterprise and competition among such enterprises. However, that competition should be carried out with regard to the broader national interest of China to avoid "excessive" or "malignant competition" that can disrupt "market order," thereby threatening the profitability and sustainability of Chinese domestic industry. To that end, in order to avoid this threat, Chinese companies are required to unite and act in unison in foreign trade against foreign competition.

31. It is in that sense that the entire economic system of China is designated not just as a "market economy" but as a "*socialist* market economy." Under this political and economic backdrop and to implement this export policy, the Import and Export Chambers were established to bridge the gap and to serve as government delegates in

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Council, 1990, Guo Fa [1990] No.70 ("...MOFTEC shall make all specialized general corporations and the import and export chambers of commerce continue to play their roles, strengthen the coordination and regulation of import and export commodities, maintain the normal operation order of foreign trade, and act in unison and uniformly in foreign trade.... Various foreign trade companies should follow the unified coordination and regulation. MOFTEC and its authorized units are authorized to prescribe necessary punishment against violators [of coordination and regulation]. The specialized general corporations should make their own operational decisions with accountability for their own losses and profits. MOFTEC is to take the lead to procedurally establish industries' import and export group corporations and act in unison and uniformly in foreign trade.") Here, the "specialized general corporations" refers to the designated foreign trade companies designated to conduct foreign trade.

regulating foreign trade.[17] As set forth below, Import and Export Chambers generally, and the Chamber regulating vitamin C in particular, were assigned certain government functions by MOFTEC and were required to coordinate and regulate exports and implement the mandatory industry self-discipline mechanism among export enterprises.

D. The Formation of Import and Export Chambers and Their "Coordination" Function

32. The Chamber was one of the national Import and Export Chambers established by the government in an effort to reform its foreign trade regime for the purpose of transforming from a planned economy to a "socialist market economy." The responsibility and power to control import and export business was transferred to the Import and Export Chambers from the specifically designated state-owned national import and export entities which had been entrusted with the exclusive right to conduct import and export business. These chambers were delegated to regulate and coordinate the import and export of the major consortiums of national industries: medicine and health products; food stuffs, native products and animal by-products; light industries; metal, minerals, and chemical products; machinery and electronic products; and textiles. Specifically, the Chamber was given the authority by the Chinese government to coordinate and regulate the import and export of medicine and health products, including vitamin C products.

33. At their formation, the Import and Export Chambers were staffed with personnel transferred

17. *See supra* note 4.

directly from the government, and they were delegated responsibility to perform certain governmental regulatory functions. For certain important trade issues, they were instructed to establish subcommittees which were directed to coordinate "on a basis consistent with common interests."[18]

34. Thus, the State Council's 1994 Decision on Further Deepening the Reform of Foreign Trade System provide ten specific areas of responsibility for these chambers, most of which are governmental and some of which are private in nature: (1) maintaining import and export operational order and protecting member companies' interests; (2) responding to foreign anti-dumping charges; (3) providing member companies with information and advisory services; (4) mediating trade disputes among members; (5) reflecting enterprises' requests and opinions to the government and offering proposals for policies formulated by the government; (6) supervising and directing member companies to operate under the laws; (7) participating in the organization of the quota bidding for the import and export commodities as authorized by competent governmental authorities; (8) participating in the organization of export fair and foreign exhibitions; (9) conducting external business exchange and communication as well as market research; (10) recommending to governmental law enforcement authorities to take measures to punish enterprises in violation of the coordination regulations or punishing violators directly in accordance with industry-wide agreements. The functions described in the above (1),

18. *See supra* note 4, p.36.

(2), (6), (7) and (10) were regulatory functions previously performed by MOFTEC which the Import and Export Chambers were directed to perform in an official capacity on its behalf.

35. As further evidence of the Import and Export Chambers' governmental nature and their role in the regulatory regime, MOFTEC effectively appoints the candidates for the senior positions of these chambers, and verifies and approves these chambers' authorized number of personnel and the total amount of their salaries.[19] MOFCOM has the authority to "approve the establishment and dismissal of the Import and Export Chambers of Commerce and subcommittees, and regulate them accordingly."[20]

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19. MOFTEC's Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (September 23, 1994). Historically, personnel of chambers of commerce were actually transferred from the state organs and state-owned foreign trade companies, which were the government instrument to control foreign trade. During their terms in the chambers, some government officials also held joint positions in either state organs or in state-owned foreign trade companies. For example, the 1991 Minutes of the Meeting with Import and Export Chambers of Commerce issued by the General Office of MOFTEC provides: "To continue to strengthen the leader team of chambers of commerce, chambers' personnel assigned from the foreign trade companies should rotate. This procedure is currently necessary and effective and the length of the rotation period could be between two years and four years."

20. *See supra* note 4, pp. 36-37.

E. The Differing Nature of Chinese Import and Export Chambers

36. Plaintiffs' expert Professor James V. Feinerman has suggested that the conduct alleged in Plaintiffs' Complaint was not compelled as a matter of Chinese law because the fact that "the defendants are members of a social organization that requires government approval for its establishment does not, by itself, mean that the government of China required their alleged conduct."[21] To reach this conclusion, Professor Feinerman primarily relies on China's Regulations on the Registration and Management of Social Organizations[22] which required all civil organizations to seek prior approval from and register with relevant government agencies prior to their establishment.[23]

37. This analysis by Professor Feinerman is incorrect because it does not recognize that there are different kinds of "social organizations" under Chinese law with different attributes. Under Chinese law, "social organization" is a broad legal term as it stands apart from an individual, an enterprise, an institution and a government office. The Regulations on the Registration and Management of Social Organizations cited by Professor Feinerman set forth the basic requirements to form all types of social organizations; it does not speak to the nature of an entity—whether it is a private organization or a government

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21. Feinerman Decl., ¶12.

22. Exhibit C to Feinerman Decl.

23. Feinerman Decl., ¶¶6-10.

delegate. By analogy, Professor Feinerman's conclusion is the equivalent of saying an apple cannot be proved to be an apple because it is a fruit, which exists in tens of thousands of types.

38. During the Chinese economic system reform, a larger number of organizations were set up and called themselves "associations" or "chambers of commerce."[24] Currently in China, social organizations such as "trade associations" or "chambers of commerce" subject to Regulations on the Registration and Management of Social Organizations can be classified into two major categories: (1) those that have been assigned certain regulatory or administrative functions, such as the China Council for the Promotion of International Trade, to which I myself am a consultant, as well as the national Import and Export Chambers mentioned above, and (2) those trade associations which are purely voluntary, having no regulatory function, and having full discretion as to the institutional size and the choice of staff. The latter are private civil organizations. The Chamber that is responsible for vitamin C belongs to the first category as it assumed regulatory functions authorized by the government since its inception.

39. The Chamber is a "foreign trade and economic social organization established with coordination and industry regulation functions" as set forth in the 1991 Measures for Administration over Foreign Trade and Economic Social Organizations ("1991 Measures"). Trade associations are

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24. However, the title of "China Chamber of Commerce of Import and Export" remains in the exclusive use of the few designated Chambers that were established pursuant to the directives of the Chinese government.

"foreign trade and economic social organizations" but not all have the "coordination and industry regulation functions." MOFCOM is "directly responsible for the daily management of social organizations established with coordination and industry regulation functions."[25] By contrast, MOFCOM does not directly supervise "social organizations" that do not have coordination and industry regulation functions.[26] As the government entity authorized to interpret the 1991 Measures, MOFCOM is charged with determining if an organization is a foreign trade and economic social organization established with coordination and industry regulation functions.[27] Most important, we should understand that the Import and Export Chambers were established pursuant to the directives of MOFCOM and have been delegated to perform specific regulatory governmental functions.

40. The national Import and Export Chambers are also vastly different from typical chambers of commerce in western countries as I understand them. The Chinese Import and Export Chambers are established by the government in a "from top to bottom" fashion and have been delegated with regulatory functions since their formation. With respect to key industries and export, membership in them is mandatory to ensure the implementation of Chinese government policy and regulation. Leaders

25. Measures for Administration over Foreign Trade and Economic Social Organizations, MOFTEC, promulgated on February 26, 1991, art. 17. "The authority of interpreting this regulation is with MOFTEC," art. 25.

26. *Cf. Id.*, art. 18.

27. *Id.*, art. 25.

of Chinese Import and Export Chambers are either appointed by the government, or selected under the supervision of the government. By contrast, chambers of commerce in western countries are usually initiated by private companies and memberships are voluntary. These western countries chambers of commerce are independent of government and do not assume governmental functions. Their officers are freely elected by member companies without government involvement or directive.

F. The Coordination Authority of the Import and Export Chambers

41. As explained above, the function of Import and Export Chambers that have regulatory authority is to further the underlying economic policies and interests of the State by ensuring coordination and orderly competition of foreign trade enterprises. Compliance with government policy, and thus with the requirements of the Chamber designed to implement and further such policies is mandatory.

42. To ensure that China's national policy was properly implemented, MOFTEC required companies engaging in foreign trade to follow the Import and Export Chambers' regulatory directions. "The Chambers of Commerce and their subcommittees shall be comprised of enterprises that have the right to conduct foreign trade business. The enterprises having the right to conduct the foreign trade business of grain and oil, native products, animal by-products, textile, costume, light industry products, art-crafts, metals, minerals, chemicals, and machinery and electronic products must join relevant chambers of commerce and subcommittees; otherwise they shall not be allowed to engage in the manufacture or distribution of

such products. The Chambers of Commerce have the right to coordinate and advise on market, customer, price, et al. ... For enterprises that do not follow the coordination, their [chamber] memberships will be suspended and their right to operate [foreign trade business] will be temporarily revoked by MOFTEC. For serious violations, MOFTEC will revoke their membership and operation right."[28]

43. "All foreign trade enterprises must be subject to the unified coordination and regulation, and MOFTEC and its authorized authorities shall take necessary disciplinary actions against any enterprise that violate such coordination and regulation."[29] Furthermore, "all relevant departments of the Ministry shall continue to support the Chambers of Commerce with their coordination and service, so that the Chambers can assist the Ministry with macro-administration."[30]

44. In 1994, the then MOFTEC Minister Wu Yi instructed Import and Export Chambers on their regulatory coordination functions as follows:

> Coordination means that all Chambers of Commerce must establish industry awareness, have the 'big trade' ideology, and coordinate the import and export transactions of members from the perspective of safeguarding the interests of

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28. *See supra* note 4 at p.36.

29. Decision on Matters concerning Further Reforming and Perfecting the Foreign Trade System, State Council, Guofa [1990] No. 70, 1990.

30. Minutes of Meeting with Import and Export Chambers of Commerce, General Office of MOFTEC, 1991.

> the members and the normal order of China's foreign trade. Enterprises having the right to operate foreign trade, including foreign-invested enterprises, shall be subject to the coordination of the Import and Export Chambers of Commerce. Coordination is a mandatory task of the chambers of commerce. With respect to the individual enterprise in violation of relevant government regulations and the industry-wide agreement, causing great losses to the country and other companies, the Chambers of Commerce shall punish these enterprises in accordance with the industry-wide agreement. Additionally, the Chambers of Commerce may propose to the competent authority to sanction such enterprises. In the future, to facilitate the coordination of the chambers of commerce, MOFTEC will set up several examples by seriously punishing enterprises which do not follow the coordination process.[31]

45. In 1994, the General Administration of Customs promulgated Interim Measures of the China Customs on Appraisal of Prices of Commodities to Be Exported and its Implementing Rules. These Interim Measures explicitly provide that when the Customs appraised the export sales price on an export declaration, it would first refer to "the export price coordinated by China Import and Export Chambers of Commerce..."[32] If the export price on the

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31. *See supra* note 8.

32. The Interim Measures of the China Customs on Appraisal of Prices of Commodities to be Exported and its Implementing Rules, General Administration of Customs, 1994, art.4.

declaration was lower than the chambers' coordinated price, "the Customs shall report the relevant information to China's import and export chambers of commerce and national authorities of foreign exchange administration."[33] "Specific punishment measures shall be decided by the import and export chambers of commerce and national authorities of foreign exchange administration."[34] It is explicit that, the export price coordinated by the chambers be followed by each exporter, which is ensured by the price review of the Customs and the Import and Export Chambers' power to impose punishment on violations.

46. As will be set forth in greater detail and supportive citation below, the general obligations described above apply to the exporters of vitamin C. Thus, directions from the Chamber in coordinating and regulating the medicine and health product industry are to be followed by its members because the Chamber is an authorized industry regulator with authority delegated by the Chinese government. The four Chinese manufacturer Defendants are required to be members of the Chamber and must comply with directions from the Chamber.[35] Defendants who fail to follow the Chamber's regulatory directions are subject to export ban and other severe penalties.

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33. *Id.*

34. *Id.*

35. The 1997 MOFTEC and SDA Notice Relating to Strengthening the Administration of Vitamin C Production and Export ("1997 MOFTEC and SDA Notice") provides all companies qualified to operate vitamin C export business must join the Vitamin C Subcommittee.

G. The Regulatory Role of Chamber Under the Licensing and Quota Regime

47. The export of vitamin C products has been subject to active regulation by the Chinese government since at least 1990 under the export quota and export licensing system and the Chamber has been given the authority and responsibility for the regulation and coordination of vitamin C export.[36] This regulation has continuously been in effect in various forms and mechanisms, adopted as a matter of national policy with respect to the economic activities of certain key industries. Thus, with respect to vitamin C, in 1990, vitamin C was classified as a "Category II" export product, the export of which was conducted in accordance with a government-mandated "guiding export plan" and by designated and licensed foreign trade companies. "Category II" export products were those that were subject to "limited international market demand capacity, quota restriction, fierce competition, and price sensitivity."[37]

48. The Chamber was explicitly provided with the "coordination and regulation" functions to administer "Category II" exports, including vitamin C. With respect to the "Category II" exports, "the Import and Export Chambers of commerce shall coordinate and regulate the market, customers, price and other aspects in accordance with the product's specific circumstances, in particular organize the chamber members to fix a nationally uniform

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36. *See* Notification of Adjusting Export Good Classification Catalogue and Strengthening Regulation of Export Goods Marketing and Sales, MOFTEC (January 23, 1990).

37. *See id.*

export price plan regularly or at any time needed, and be in charge of supervision and implementation."[38] "The relevant Import and Export Chambers of Commerce shall form respective sub-committees or coordination management teams to be responsible for coordinating and regulating [Category II exports]."[39]

49. Vitamin C exports have been subject to this State-mandated "coordination" process involving the participation of industry members. It is not a voluntary process. The 1992 Interim Regulation of Export Products subjected 38 types of products including vitamin C to the planned quota administration. According to the 1992 Interim regulation, the 38 kinds of goods were classified as "Category I" exports, which are the "resource products of large export amount and concerning the livelihood of the nation and the people, and traditional export products of large export amount and of great importance to China's export." The 1992 Interim Regulation again prescribed the mandatory "coordination" process: "Export goods subject to coordination shall be uniformly regulated and coordinated by the respective Import and Export Chambers of Commerce. Enterprises engaged in producing and selling goods subject to export quota license system must join relevant Import and Export Chambers of Commerce. The specific coordination and regulation method shall be strictly implemented after discussion and approval by the member meetings."[40]

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38. *See id.*

39. *See id.*

40. Interim Regulation of Export Goods, MOFTEC, MOFTEC Order No.4 (December 29, 1992).

50. The implementation of this mandatory "coordination" process was ensured by the regulations under the quota and licensing system. The 1995 MOFTEC Regulations on the Allocation of Export Quotas similarly provides that one of the prerequisites for obtaining an allocation of export quotas is "to join the relevant Import and Export Chamber of Commerce and be voluntarily subject to the coordination." Additionally, the 1996 Provisions on the Regulation of Licenses provided that when the price in the export contract is lower than the coordinated price set by the relevant Import and Export Chamber of Commerce, the export licensing authority shall refuse to issue the export license.

51. The Chinese Government specifically focused on vitamin C and the need to ensure that its national policy directives were achieved at around this same period of time. At the end of 1995, three Vice Premiers instructed MOFTEC to address the problems in the vitamin C industry. Following these instructions, in 1996 MOFTEC held an emergency meeting with its local provincial offices, main exporters and manufacturers, the Chamber and officials from State Drug Administration ("SDA")[41] to "strengthen the regulation of vitamin C export, protect the hard-earned international market share, and promote the healthy development of [vitamin C] export."[42] After

41. SDA was at that time the highest level of Chinese government administrative authority directly under the State Council that regulated food and pharmaceutical products; as of March 2008, SDA has become part of the Ministry of Public Health.

42. Emergency Notice of Holding Vitamin C Export Work Meeting, Foreign Trade Regulation Department of MOFTEC, January 31, 1996.

the meeting, MOFTEC then sent a report to the State Council, identifying several problems, including Chinese vitamin C's excessive reliance on export, low export prices and too many competing exporting channels.[43] MOFTEC observed, among other things, that Chinese vitamin C manufacturers built an overcapacity in response to the high profit and strong demand in the international market in the earlier years, and the foreign manufacturers attempted to reclaim market share by lowering prices.[44] MOFTEC concluded: "price competition in the current vitamin C export is mainly a competition between Chinese vitamin C manufacturers and international conglomerates; the competition among Chinese vitamin C manufacturers is only secondary."[45] Low price competition and export disorder were "serious hidden dangers to [China's] vitamin C export's further healthy development."[46]

H. The Establishment of the Vitamin C Subcommittee

52. This Court's November 6, 2008 Memorandum and Order questioned whether the Vitamin C Subcommittee was established at the request of private parties or

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43. MOFTEC's Report to State Council Concerning Current Vitamin C Export Issues and Suggestions for Solutions, Wu Yi [1996] Waijingmao Guanfa No. 185, p.3.

44. *Id.*

45. *Id.*

46. *Id.* at p 5. Consequently, MOFTEC proposed draconian measures including a ban on any new vitamin C manufacturing facility or expansion in the next three years, a production restriction on existing vitamin C manufacturers, control on total export amount and adjusting existing quota allocation method to promote scaled export.

defendants in this case.[47] It was not. In 1997, MOFTEC and SDA jointly issued a regulation and required the Chamber to establish the Vitamin C Subcommittee.[48] As MOFTEC and SDA noted at that time, "[Chinese] vitamin C export encounter[ed] intense competition and challenges from the international market."[49] "In order to rectify the operational order and optimize the operational team of vitamin C export, realize the scale-operation on export, improve the competitiveness of [Chinese] vitamin C products in the international market, promote the healthy development of vitamin C export and maintain the interest of [China] and enterprises," MOFTEC and SDA announced several measures including requiring the Chamber to establish the Vitamin C Subcommittee.[50]

53. The coordination and regulatory functions of the Vitamin C Subcommittee were explicity mandated by MOFTEC and SDA: "The main responsibilities of this [Vitamin C Subcommittee] are to coordinate with respect to vitamin C export market, price and customers..."[51] "All enterprise qualified to operate vitamin C export shall participate in [the Vitamin C Subcommittee.]"[52]

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47. November 6, 2008 Court Memorandum and Order, at p.30.

48. 1997 Notice Relating to Strengthening the Administration of Vitamin C Production and Export (1997), MOFTEC Guan Fa No. 664, issued on November 27, 1997, art. 6.

49. *Id.*, introductory paragraph.

50. *Id.*, para. 6.

51. *Id.*, para. 6.

52. *Id.*

54. MOFTEC and SDA set forth a general framework for this "coordination" process, involving participation by industry members, charging the Chamber with the responsibility of implementing the specific regulatory coordination method to be effectuated via a "subcommittee" related to some specific products, i.e. vitamin C products, which are organized by the Chamber and operating under its active supervision and direction: "[The Vitamin C Subcommittee] shall timely organize meetings for the major vitamin C export enterprises according to the domestic and international market development, to conduct studies on market strategies, timely formulate and adjust export coordination price, which the vitamin C enterprises must strictly implement in accordance with."[53] The licensing agencies authorized by MOFTEC were required to rigorously examine enterprises' qualifications to export Vitamin C products, the exporting enterprises' export contracts and issue export license in accordance with vitamin C's coordinated export price and quota quantity. Violations were subject to serious punishment.[54]

55. The requirement that the Chamber and the Subcommittee be responsible for "coordinating the China vitamin C export market, price and customers" was reiterated as one of the functions for the Vitamin C Subcommittee when MOFTEC approved the establishment

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53. *Id.*, para. 7.

54. *Id.*, paras. 9 and 10. Sanctions will be imposed on export enterprises in violation of the relevant provisions of this notice. Once verified, the sanctions could range from the reduction of export quotas to the cancellation of export qualifications, according to with the seriousness of the violation.

of the Vitamin C Subcommittee.[55] This authority to "coordinate and administrate market, price, customer and operation order of vitamin C export" was subsequently incorporated in the Vitamin C Subcommittee's Charter.[56]

56. This Court's November 6, 2008 Memorandum and Order further states that "One area that appears to be ripe for discovery is the degree to which defendants coordinated pricing before and after December 2001. If the apparatus and mandate for price-fixing was in place as of 1991 (when the Chamber was formed) or 1997 (when the Vitamin C Sub-Committee was formed), but no price-fixing occurred until market power was achieved, plaintiffs would have a stronger argument that defendants' actions were voluntary." The answer to this question is that, as set forth above, vitamin C exports have been subject to the mandatory coordination and regulation since as early as 1990 and the vitamin C manufacturers' participation in the coordination process was mandatory because their membership in the Vitamin C Subcommittee and compliance with its directives was mandatory on pain of losing the right to export for non-compliance.

57. The events alleged in the Complaint in this case flow not from voluntary activity, but rather are simply a continuation of the mandatory governmental regulation

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55. MOFTEC Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers & Exporters (March 23, 1998).

56. Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers & Exporters, dated October 11, 1997.

that I have described and which was in place for nearly 10 years before. Thus, the first alleged conspiracy meeting that the Complaint cites was a meeting convened by the Chamber at MOFTEC's direction in response to alerts from the Chinese government that its industries were running the risk of dumping.[57] Thereafter, and continuing throughout the period during which the Defendants are accused of conspiring, meetings were convened as appropriate by the Chamber and the members of the Vitamin C Subcommittee for the purpose of implementing the national competition policy of maintain a profitable vitamin C industry in China through coordination of price and output. Thus, both before and after the commencement of the period in which Defendants are alleged to have acted illegally under U.S. antitrust law, the vitamin C manufacturers were required to act in accordance with the same policy and to do so by participating in the activities of the Chamber's Vitamin C Sub-committee.

I. The Chamber's Regulatory Role in the Post-2001 Verification and Chop System

58. The Chamber's government-delegated authority in "coordination and industry regulation" was extended following China's accession into the WTO in December 2001. In 2002, as delegated jointly by MOFCOM and the General Administration of Customs, the Chamber implemented a "verification and chop" system to replace the previous export quota restriction for the purpose of continuing the Chambers' "coordination of prices and

57. Minutes of Meeting by Officials of Vitamin C Manufacturers, JJPC 0043070.

industry self-regulation" pursuant to basic Chinese national policy requiring the continued regulation and supervision of certain key industries.[58]

59. Vitamin C products are one out of 36 types of products which are particularly controlled by the State and subject to the verification and chop system. Exporting companies are required to hold memberships in the Vitamin C Subcommittee and comply with the industry coordination enforced by the Chamber and the Vitamin C Subcommittee. The Chamber and the Vitamin C Subcommittee acted within their role and authority granted by MOFCOM when engaging industry members in meetings to discuss the vitamin C market, price and extent of production.[59]

60. Details of the "verification and chop" procedure are provided in the 2003 Announcement of MOFCOM and the General Administration of Customs (Notice No. 36).[60] For those commodities that have been subject to "verification and chop," before declaring to the Customs, the export company shall send the export contract, both the original and the copy thereof, to the relevant Import and Export Chambers for review and approval. The relevant chamber shall then review and approve the proposed export contract submitted by exporting companies based on the industry-wide coordination it

58. *See* MOFTEC and Customs Notice of Adjustment of the Catalogues of Export Products Subject to Price Review by the Customs, MAO FA [2002] No. 187 (March 29, 2002), art. 4.

59. *Id.*

60. 2003 No. 36 Public Notice Issued by MOFCOM and General Administration of Customs of the PRC, dated November 29, 2003.

has supervised.[61] Upon approval, the Import and Export Chamber is required to provide a "Chop Form" and the export contract to the exporting company after stamping an anti-fake seal for verification on the designated place of the "Chop Form," as well as on the final price and quantity indicated on the export contract. The export company is required to present the original copy of the stamped "Chop Form" and the export contract to the Customs for export declaration. The Chamber's legal authority to review and place its "chop" of approval on a manufacturer's export contract is one of many indicia of the governmental authority that MOFCOM delegated to the Chamber to regulate the Vitamin C industry.

61. It is also important to understand that the implementation of the verification and chop mechanism, following China's accession to the WTO, did not in any way change the level of control that the government maintained over the vitamin C industry. Just as it was before the implementation of verification and chop, the Vitamin C Subcommittee remained a government-authorized coordination organization, within the Chamber, which was set up in accordance with national regulations and policies and was delegated with authority to regulate export on behalf of the government. The price-coordinating meetings and industry-wide agreements regarding production cutbacks, export quotas and other measures that were facilitated by the Vitamin C Subcommittee continued to serve to advance national interests I have described above, and to maintain the proper export order with which the government was concerned.

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61. *Id.*

62. There has been at all times a national economic policy requiring coordination within key industrial segments, such as vitamin C, in order to avoid harmful forms of price competition that were considered antithetical to the national interest. Acting through the Chamber, the vitamin C manufacturers were obligated to carry out that policy under the auspices of the Chamber by coordination of price and output. This was true in the period after 2001 as well as in the years before, as I have also described above. The mechanism through which this was to be accomplished was not the key point. Rather, the essential point was that the manufacturers were required to act in a coordinated fashion to further national Chinese economic policy.

63. Measured adopted after 2001, such as the verification and chop system, price coordination and production and supply restraints retain the same mandatory nature as the export restraint measures implemented since 1990. Enterprises' participation of export coordination led by the Chamber, including discussion of the market, price, output and export volume under the direction of the Chamber, and the making of and compliance with the coordinated measures are all required practice since 1990. Defendants' right to export will be forfeited if they refuse to participate in the coordination or fail to follow a coordinated measure.

J. The Mandatory "Coordination" Mechanism During the Alleged Conspiracy Period

64. This Court's November 6, 2008 Memorandum and Order correctly observed that the word "coordination" has a particular meaning in the context of China's government

and economic policy.[62] In the context of Chinese economic regulation and policy, the term "coordination" entails a regulatory process, conducted by the Chamber under the direction and authorization of MOFCOM, which involves mandatory discussion among industry members in order to find appropriate regulatory measures to advance China's national interests and to reduce foreign trade disputes.

65. As set forth in analysis above, the Chamber's coordination function was granted by MOFCOM pursuant to Chinese laws and policy. The coordination and regulation conducted by Chambers is an important regulatory means in the country's foreign trade system as China is transforming from a central, direct administrative system to a socialist market economy where the government is expected to monitor and control individual companies' market activities on a policy level, delegating and assigning the specifics of regulation downward. The purpose of coordination is to have domestic companies compete in the international market as a unity, to build healthy foreign trade operational order, expand China's export, and advance China's collective interest.[63] The implementation of the mandatory process is assured by the regulatory authority of Chambers and MOFCOM.

66. As this Court's November 6, 2008 Memorandum and Order also notes, Plaintiffs allege that "the Ministry has not pointed to a single law or regulation compelling

62. November 6, 2008 Memorandum and Order, at p.18, n.7.

63. Rules on Strengthening the Coordination and Regulation of Export Goods, MOFTEC, effective February 22, 1991.

a price or price agreement at issue."[64] But Plaintiffs misunderstand China's export regulatory system. Chinese laws and regulations put in place a mandatory "industry coordination" process for exports of important national interest and the Chinese government entrusted the Chamber to find the most appropriate industry measures through the mandatory regulatory process. That process mandates that industry members discuss market circumstances, pricing and other relevant factors in order to find the most appropriate coordination measure. Once appropriate measures (such as quota, price or volume restriction, or mandated joint activities) are adopted by the Chamber, such measures become mandatory as a matter of Chinese law and regulatory practice. That is a regulatory process mandated by the Chinese government under Chinese laws and regulations, and implemented by the Chamber with authority granted to it by the Chinese government.

67. As this Court's November 6, 2008 Memorandum and Order also notes, Plaintiffs contend that defendants' price agreements are voluntary by citing to documents that contain words such as "agreed by voting" or "reached an agreement."[65] As explained above, the "industry coordination" process is a government mandated regulatory process and is not voluntary in the sense that vitamin C manufacturers were free to ignore it. To the extent certain Defendants may have engaged in discussions of vitamin C market prices or production levels with or without the Chamber's presence, such conduct is

64. November 6, 2008 Memorandum and Order, at p. 17.

65. *Id.*, at pp. 19-20.

part and parcel of the government-mandated "industry coordination." The purpose is to find the appropriate regulatory measures, which the Chamber has been authorized and directed to implement.

68. This Court's November 6, 2008 Memorandum and Order suggests that it is difficult to determine the degree of defendants' independence in making pricing decisions because certain documents seem to indicate that some defendants had their own self-interest in participating in the coordination process.[66] Whether the individual companies' self-interest coincided with the "industry coordination" process does not change the nature of this "industry coordination" – a government mandated regulatory process for the purpose of finding the appropriate industry regulatory measures. MOFCOM and its delegate – the Chamber – are fully authorized to implement and enforce it to make it effective. The penalty for non-compliance is severe – the non-compliant company will lose its right to export.[67]

K. "Industry Self-Discipline" and Government's Concern with Advancing National Interest and Avoiding "Price Wars"

69. Also as noted by this Court's November 6, 2008 Memorandum and Order, Plaintiffs contend that defendants' price agreements are voluntary by citing to documents that contains words such as "industry self-

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66. November 6, 2008 Memorandum and Order, at pp. 22-23.

67. 2003 No. 36 Public Notice by MOFCOM and China General Administration of Customs.

discipline" and "voluntary self-restraint."[68] These words also must be understood within the context of Chinese economic and regulatory policies. They do not entail voluntary actions by Defendants.

70. "Industry self-discipline," is a term that has a widespread and well-understood usage in Chinese industrial policy.[69] As I have noted above, this concept of self-discipline was emphasized by Minister Wu in her speech in 1994. The Import an Export Chambers that were converted from government ministries were assigned important functions to implement the concept, and it was officially sanctioned by the government in 1998.[70] "Self-discipline" means that all industries shall maintain import and export order in accordance with laws, regulations and rules and shall not conduct operation in violation of regulations regardless of national interest. While the coordination was a top-down regulation system led by MOFTEC and implemented by Import and Export Chambers, the industry self-discipline mechanism was a mutual supervision measure among export enterprises required for the implementation of government policy of acting in unison to achieve overall national profit and to develop successful domestic industries.

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68. November 6, 2008 Memorandum and Order, at p. 18.

69. "Industry self-discipline" is the most common English translation of the Chinese, although "industry self-regulation" could also serve as a literal translation.

70. *See* Owen, et al, "Chinese Competition Policy Reforms: The Anti-Monopoly Law and Beyond," 75 Antitrust L.J. 231, 241 (2008) and authority cited.

71. Specifically, because vitamin C is a major export industry, the Chinese government has paid close attention to its regulation to prevent Chinese companies from engaging in competition against each other for the purpose of maximizing their own profits at the expense of the national interest, and that is what is meant by "industry self-discipline" and "voluntary self-restraint."[71] As an example, in a meeting held by Chamber on April 13, 2001, an officer of MOFTEC's Department of Foreign Trade admonished the vitamin C manufacturers and exporters: "Even though VC is not a resource product, it has been strictly regulated since 1997... MOFTEC attaches importance to the establishment and development of the Chamber and requires the Subcommittee to act proactively. Enterprises need to obey the industry agreements and industry rules. When enterprises are maximizing their profits, they also need to consider the interest of the State as a whole."[72]

72. Plaintiffs have relied on website reports to suggest that the Defendants reached "a voluntary agreement on price fixing and production restraints." However, within China's self-discipline context the term "voluntary" refers to the fact that market participants have some limited control over the time, place and manner in which they carry out the regulatory mandate to reach industry-wide agreements to further China's economic policies. In China's regulatory context enterprises are expected to discuss matters among themselves with a view towards reaching a consensus as to how best to go about furthering

71. *See* 1997 MOFTEC and SDA Notice.

72. Deposition Exhibit 173, JJPC0043064.

the required coordination in a manner consistent with "the interest of the State as a whole" and, in doing so, are expected to follow Chinese laws, and regulations under the leadership of the Chambers of Commerce.

73. Similarly, although there are documents indicating that on occasion there were extended discussions, and occasions where agreements were not reached, this does not demonstrate a lack of compulsion or regulation, but rather is inherent in the idea that the parties were mandated to engage in self-discipline to achieve basic policies, but had freedom in deciding the manner in which coordination was to be achieved consistent with national goals.

74. Metaphorically speaking, the industry self-discipline mechanism under the coordination and regulation of Import and Export Chambers in China's foreign trade regulatory regime is like a race competition, having strict rule and a reward and penalty system. Participants (export companies) who comply with the rules will have the right to participate in the competition; otherwise, they will be punished or even disqualified for the race. Therefore, the so-called voluntary self-discipline of Defendants is a mechanism that is engaged in pursuant to a mandated regime of coordinated behavior related to price and output that must be implemented in a manner that furthers China's national economic policy.

75. Properly understood, what the government is compelling is the active participation of the industry in a mandated process which must be obeyed. It is also important to note that in China, having established the broad regulatory framework through regulations, directives and implementing orders are frequently given in an oral fashion. Chinese governmental control is a quite different

process from what takes place in other countries, and the fact that directives are oral, or terms such as "self-discipline" or "voluntary self-restrain" are used does not change the forcefulness or compulsion which attaches to such directives when given in China – especially when such directives are given to companies which themselves have significant government ownership and whose officials receiving such directives are party members and appointees. Importantly in the Chinese regulatory system where companies still have significant state ownership, the national and regional governments play an ongoing role, and top managers and executives generally owe their business positions to political appointment, it is generally unnecessary to use those levers of control. The fact that they exist, and that the enterprises are so closely intertwined with the government, gives force to the regulatory system I describe herein.

76. As reflected in the regulations set forth above and noted by legal scholars, China's industry export self-discipline measures mean the export self-discipline measures implemented by the Import and Export Chambers authorized or entrusted by the government, including restriction on capacity and export volume or adjustment of export price to reduce and mitigate competition, for the purpose of furthering China's national interest and resolving or avoiding trade frictions with other countries. Chinese legislators contemplated that trade associations would play an important role in enhancing the competitiveness of domestic industries. "In particular, the lawmakers want the trade associati... to eliminate 'vicious competition,' or cutthroat price wars."[73]

73. Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 Antitrust L. J. 117, 129 (2008).

77. The concept of industry self-discipline is ingrained in China's economic regulatory framework. The Chinese government requires chambers and trade associations to promote "self-discipline" among competitors to avoid such "price wars" and to promote national interest. Article 56 of the Foreign Trade Law provides that "[t]he relevant associations and chambers of commerce shall abide by laws and administrative rules, provide the members with services related to production, marketing, information, and training in accordance with articles of association, perform the function of coordination and self-discipline...."

78. The concept of self-discipline most recently was re-iterated and reaffirmed by China's newly-enacted Anti-Monopoly Law. Article 11 of the Anti-monopoly Law adopted in August 2008 explicitly requires trade associations to "strengthen industry self-discipline, guide business operators to lawfully compete, safeguard the competition order in the market...."[74]

79. As I have noted previously, part of the concern that arose from the transition to a type of market economy was that companies would price so low that they actually would create a serious risk of anti-dumping actions. In fact, that was the genesis of the November, 2001 meeting. However, as reflected in the documents I have seen and in the MOFCOM website, industry self-discipline was intended

74. Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress on August 30, 2007 and effective August 1, 2008), art. 11. *See also,* art. 15 (The Anti-Monopoly Law does not apply to an agreement among business operators "for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation")

not merely, or even principally, to address antidumping concerns. Rather, it was to implement the much broader national export policy that has existed for many years and that requires Chinese companies to refrain from engaging in excessive competition to pursue short term self-interest at the consequence of disrupting trade order, and to act in unity in the international market in order to develop profitable and successful national industries.

I. A Verified Government Seal Is Not Required under Chinese Law to Cite to a Law or Regulation

80. As a final point, I would like to explain that Professor Feinerman incorrectly concludes, in his August 15, 2006 Declaration that the regulations attached to MOFCOM's Amicus Curiae Brief are not properly authenticated under Chinese law because they do not bear a verified official chop.[75] For a document to be authenticated in China, Chinese law does not require a verified seal or chop in addition to a proper notarization. These Chinese government regulations are provided by an authorized representative of MOFCOM, which is either the issuer, designated enforcement agency, or the authorized interpreter of these regulations, and therefore are properly authenticated.

Respectfully Submitted,

/s/_____

Professor Shen Sibao

Dated: February 19, 2009

75. *See* Exhibit B to Feinerman Decl.

JUNE 2004 WORK SUMMARY, IMPORT/EXPORT DEPARTMENT, DATED JULY 4, 2004

June 2004 Work Summary
Import/Export Department

2. THIS MONTH'S BASIC SITUATION

Redacted

4) BUSINESS ASSOCIATION MEETING

On June 15th, the VC regulation meeting was held in Shanghai. The six domestic VC manufacturers attended the meeting. President Kong, President Wang, and Wang Qi represented our company at this meeting. At this meeting Weisheng Pharmaceutical Industry re-proposed the agenda for quoting while stopping production, because their production line had problems. Finally, they reached an agreement, in which the 6 domestic VC manufacturers will arrange to suspend production before the end of October. However, with respect to when to start the suspension and how long it lasts, each manufacturer will decide for themselves.

Observing the impact of the meeting to the market, the market price after the meeting started to rise. Until the end of June, the average quotation price stabilized between 5.00-5.50 USD/kg.

There are two main reasons: one is because Weisheng Pharmaceutical Industry actually stopped production at the end of June, the

supply of Chinese VC to international markets has been reduced. Meanwhile, by virtue of the other manufacturers following the plan to stop production over the next few months, a psychological impact has been given to the market although the production has not been suspended yet.

Redacted

Import/Export Company: Wang Qi July 4th, 2004

Cc: President Kong, President Ji, GM Wang

Cc: Liu Yin Zhen, Yu Xiao Zhuan

2002 CHARTER OF THE VITAMIN C SUBCOMMITTEE OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS, APPROVED JUNE 7, 2002

Appendix 2:

CHARTER OF THE VITAMIN C SUBCOMMITTEE OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS

Section One: General Principles

Article One: This Charter has been formulated in accordance with the relevant state laws and regulations and the *Articles of Association for the China Chamber of Commerce of Importers and Exporters of Medicines and Health Products.*

Article Two: The name of this organization is China Chamber of Commerce of Medicines and Health Products Importers and Exporters Vitamin C Subcommittee (hereafter referred to as "the Subcommittee"), and it is registered with the state association administrative authority in accordance with the relevant laws.

Article Three: The Subcommittee is a component of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters (hereafter referred to as "the Chamber of Commerce"), and is a self-disciplinary industry organization jointly established on a voluntary basis by those Chamber of Commerce members which conduct import and export of vitamin C. It does not have a legal person status.

Article Four: The purposes of the Subcommittee are to observe the state laws, regulations and the Articles of Association for the Chamber of Commerce, to coordinate and guide the vitamin C import and export business as well as related activities, to provide consultation and services to its members and relevant governmental departments, to maintain the normal working order of vitamin C import and export operations, to ensure fair competition, to protect the national interest and the legal rights and interests of its members, and to promote the healthy development of the vitamin C import and export trade.

Article Five: The Subcommittee accepts guidance and supervision from the Chamber of Commerce.

Section Two: Functions

Article Six: The Subcommittee shall serve as a liaison between the government and its members, between the domestic and overseas markets, and among the relevant industries.

Article Seven: The Subcommittee shall introduce national economic and trade laws, regulations, guidelines and policies to its members, and shall guide and oversee the operations of its members in accordance with the law.

Article Eight: The Subcommittee shall coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members.

Article Nine: The Subcommittee shall study methods and measures for the expansion of the vitamin C import and export trade, and shall organize discussions of import and export trade strategy and planning. The Subcommittee shall represent the interests of its members, communicate the status, opinions and suggestions of its members to the relevant departments of the government, and make suggestions to the relevant departments of the government in formulation of vitamin C import and export trade policies.

Article Ten: The Subcommittee shall participate in domestic and overseas activities and international exchanges for the promotion of vitamin C import and export, shall establish and develop a cooperative relationship with related domestic and international industrial organizations, and help its members to develop in the international marketplace.

Article Eleven: The Subcommittee shall exchange knowledge and experience in developing vitamin C production, improving commodity quality, improving operations and management, and promoting collaboration between industry and trade; shall collect and organize information regarding the domestic and overseas markets for vitamin C, including clients, production, sales and other relevant information; and shall provide consulting services to its members.

Article Twelve: The Subcommittee shall organize relevant businesses to prepare response to antidumping accusations against vitamin C of our country; shall investigate dumping and unfair competitive activities of foreign products in our country in response to

members' complaint, and submit requests to the relevant governmental departments for measures to be taken in accordance with the industry's requests.

Article Thirteen: The Subcommittee shall implement other duties as authorized by the government or the Chamber of Commerce or as requested by the members and necessitated by industry agreements.

Section Three: Membership

Article Fourteen: The following conditions must be met when submitting an application for membership on the Subcommittee:

(1) Must be a member of China Chamber of Commerce of Medicines and Health Products Importers and Exporters;

(2) Must support this charter;

(3) Must be willing to engage in the vitamin C import and export business and to operate in accordance with the law;

(4) Must indicate an intention to join the Subcommittee.

Article Fifteen: Procedures for joining the Subcommittee:

(1) Submit an application for membership on the Subcommittee;

(2) File registration documents with the relevant administrative departments of the state;

(3) The Subcommittee will review the application in accordance with the above-mentioned requirements, approve those applications that meet the conditions for joining the Subcommittee, and conduct registration.

Article Sixteen: Rights of Members:

(1) To elect, to be elected and to vote within the Subcommittee;

(2) To participate in the various activities organized by the Subcommittee;

(3) To enjoy the various services provided by the Subcommittee;

(4) To bring forth comments, suggestions and proposals on relevant issues involving import and export;

(5) To bring forth comments, suggestions and proposals on relevant issues involving the organization of the Subcommittee;

(6) To monitor the work of the Subcommittee, and bring forth comments and suggestions;

(7) To disclose and expose enterprises and individuals who violate the state laws, regulations and policies, who violate this Charter, who disobey resolutions of the Subcommittee, and who harm the interests of the state or its members;

(8) To freely resign from the Subcommittee.

Article Seventeen: Obligations of Members

(1) Comply with the Charter of the Subcommittee;

(2) Implement the resolutions and agreements of the Subcommittee;

(3) Actively participate in the various activities organized by the Subcommittee;

(4) Perform their tasks as required by the Subcommittee;

(5) Report to the Subcommittee and provide relevant information, materials and data to the Subcommittee;

(6) Accept the coordination of the Subcommittee.

Article Eighteen: Members wishing to resign from the Subcommittee shall inform the Subcommittee in writing, return all relevant documents evidencing its membership, and initiate the formal membership resignation process.

Article Nineteen: The Subcommittee will punish members found to have engaged in the following activities:

(1) Violation of the charter of the Subcommittee;

(2) Failure to implement the resolutions of the Subcommittee;

(3) Failure to implement industry agreements;

(4) Violation of state laws, regulations and rules in business activities;

The disciplinary actions of the Subcommittee include circulating of a notice of public criticism, issuing a warning, temporarily suspending membership, and termination of membership. Punishing a member must be approved by the Council of the Subcommittee (hereafter referred to as "the Council").

Article Twenty: The Subcommittee implements a system of regular membership registration, and the timeframe and procedures for registration is determined by the Council. Failure to register within the specific timeframe will result in an automatic loss of membership.

Section Four: Organizational Structure

Article Twenty-One: The Annual Meeting of the members of the Subcommittee (hereafter referred to as "the Annual Meeting") is the organization of ultimate power in the Subcommittee.

Article Twenty-Two: The Annual Meeting exercises the following duties:

(1) Make decisions regarding the guidelines and tasks of the Subcommittee;

(2) Formulate, review, and amend the charter of the Subcommittee;

(3) Formulate, review, and amend the important working rules of the Subcommittee;

(4) Review the work reports of the Council;

(5) Elect and dismiss the Subcommittee's Council members;

(6) Elect and dismiss the Subcommittee's Investigative Group members;

(7) Review proposals of the Council and members;

(8) Make decisions regarding issues of dissolution;

(9) Make decisions regarding other important issues.

Article Twenty-Three: The Annual Meeting is held once a year. In case of any extenuating circumstances, and upon approval by a vote of the Council or upon a proposal brought forth by more than half of the members, the meeting date can be moved up or extended.

Article Twenty-Four: Upon a proposal jointly brought forth by one-third of the members or more than one-half of the Council members, or upon a request brought forth by a supervising governmental agency, an Interim Meeting may be held.

Article Twenty-Five: The Interim Meeting exercises the following duties:

(1) Review proposals of the Council and members;

(2) Formulate specific coordination solutions;

(3) Coordinate other issues related to the work of the Subcommittee.

Article Twenty-Six: The Annual Meeting or the Interim Meeting can be held only when two-thirds of the members are present at the meeting. A resolution thereof can go into effect only when it is approved through voting by more than two thirds of the members present at the meeting.

Article Twenty-Seven: A Council is established by the Subcommittee. The Council is the enforcement body of the Annual Meeting, performs the routine work of the Subcommittee when the Annual Meeting is not in session, and is responsible for the Annual Meeting. The Council exercises the following duties:

(1) Implement the resolutions of the Annual Meeting and the Interim Meeting;

(2) Elect and dismiss the Chairman, the Vice-Chairman, the Secretary-General and the Deputy Secretary-General of the Council;

(3) Guide the routine work of the Subcommittee;

(4) Prepare for the convening of the Annual Meeting and the Interim Meeting;

(5) Submit work reports to the Annual Meeting;

(6) Organize and coordinate the specific implementation of resolutions;

(7) Invite businesses to join the Subcommittee;

(8) Receive, review and respond to member proposals;

(9) Accept the recommendations made by the Investigative Group of the Subcommitttee, and punish members found to be in violation of the rules;

(10) Perform other duties authorized by the government and the Chamber of Commerce and entrusted by the Annual Meeting.

Article Twenty-Eight: The Council has a fixed term of office. Each term of office is four years, and upon expiration of the term of office of the Council, the Annual Meeting is held to reelect the Council. When the Annual Meeting is moved up or postponed, the term of office of the Council will be modified accordingly.

Article Twenty-Nine: The slate of candidate for Council of the Subcommittee and the method for its determination shall be proposed by the Council, which is responsible for the preparations for the convening of the Member Meeting, after seeking written opinions from all members. The Subcommittee Council is formed through a democratic election at the Annual Meeting. Subcommittee

Council members can only be selected from the members of the Subcommittee. Council members can hold office for another term upon being reelected.

Article Thirty: The Council holds two meetings each year, which are to be presided over and called by the chairman of the Subcommittee Council. When the chairman of the Council thinks it necessary, upon seeking opinions from the Council members, or upon a proposal jointly brought forward by more than one-half of the members, an Interim Council meeting may be held. When there are extenuating circumstances, the meeting can be held by telecommunication.

Article Thirty-One: A council meeting can be held only when more than three-quarters of the Council members are present at the meeting. The resolutions thereof can only take effect when it is approved through a vote by more than two-thirds of the Council members present at the meeting.

Article Thirty-Two: an Investigative Group is set up in the Subcommittee. The Investigative Group of the Subcommittee is the monitoring organization of the Subcommittee, and is responsible for the Annual Meeting of the Subcommittee.

Article Thirty-Three: The Investigative Group of the Subcommittee exercises the following functions and powers:

(1) Monitor the implementation of the charter and the various resolutions of the Subcommittee;

(2) The position of Chairman of the Investigative Group is concurrently held by the Secretary-General;

(3) Receive reports from the members of the Subcommittee regarding various accusations of violations of the state laws, regulations, or the charter and resolutions of the Subcommittee, and conduct investigations;

(4) Organize questioning of members accused of violations of the rules;

(5) Cast votes to arbitrate concerning member conduct to determine whether or not its conduct violates the rules;

(6) Submit work reports to the Annual Meeting of the Subcommittee;

(7) Submit determinations of rule violation to the Subcommittee Council;

(8) Perform other duties entrusted by the Member Meeting of the Subcommittee and through industry agreements.

Article Thirty-Four: The Investigative Group has a fixed term of office, which is the same as that of the Council, and is re-elected concurrently with the Council. The members of the Investigative Group are determined through a democratic election at the Member Meeting. The members of the Investigative Group can only be selected from among the members of the Subcommittee. The members of the Investigative Group can hold office for another term upon being reelected. A member of the Investigative Group cannot concurrently serve as a member of the Council (with the exception of the staff of the Chamber of Commerce).

Article Thirty-Five: The Investigative Group of the Subcommittee does not hold regular meetings; meetings will be convened by the Group's chairman in accordance with actual circumstances and needs.

Section Five: Leadership

Article Thirty-Six: The Subcommittee has one Chairman, one Vice-Chairman, one Investigative Group Chairman, one Secretary-General, and one Deputy Secretary-General.

Article Thirty-Seven: The Chairman and the Vice-Chairman are determined through a democratic election by the Council; the term of office is one year, and they can hold office for another term upon being reelected. The president can only be selected from the representatives of the member organizations during that term.

Article Thirty-Eight: The Chairman of the Investigative Group of the Subcommittee has a term of office of one year, and can hold the office for another term upon being reelected.

Article Thirty-Nine: The Vice-Chairman, the Secretary-General, and the Deputy Secretary-General are positions assumed by members of the permanent administrative body of the Chamber of Commerce. The Vice-Chairman, the Secretary-General, and the Deputy Secretary-General are nominated by the Chairman of the Chamber of Commerce, and are determined through election by the Council. The term of office thereof is the same as that of the leadership positions mentioned above. The Secretary-General can hold the office for another term upon being reelected.

Article Forty: Duties of the Council Chairman

(1) Convene and chair Council meetings;

(2) Represent the Subcommittee to the public, and sign important documents on its behalf;

(3) Preside over the work at the Subcommittee and the Council;

(4) Review the status of the implementation of the resolutions of the Annual Meeting and the Council;

(5) Assume responsibility for the Annual Meeting and the Council, and submit work reports to them.

Article Forty-One: The Vice-Chairman assists the Chairman in his duties, and when the Chairman cannot perform his duties for any reason, those duties will be assumed by the Vice-Chairman.

Article Forty-Two: Duties of the Chairman of the Investigative Group:

(1) Convene and chair Subcommittee Investigative Group meetings;

(2) Preside over the work of the Investigative Group of the Subcommittee;

(3) Review the status of the implementation of the determinations reached by the Investigative Group of the Subcommittee;

(4) Assume responsibility for the Annual Meeting, and submit work reports to it.

Article Forty-Three: Duties of the Secretary-General

(1) Implement the resolutions of the Annual Meeting and the Council, and organize the implementation of the work plan of the Subcommittee;

(2) Assist the Chairman and Vice-Chairman of the Council;

(3) Take responsibility for the routine secretarial work and communications of the Subcommittee;

(4) Take responsibility for the routine administrative work of the Subcommittee;

(5) Recruit staff for the Subcommittee based on the working needs of the Subcommittee;

(6) Perform other duties as entrusted by the Annual Meeting, the Council, the Investigative Group, the Chairman of the Council, and the Chairman of the Investigative Group.

Article Forty-Four: The Deputy Secretary-General assists the Secretary-General, and when the Secretary-General cannot perform his duties for any reason, those duties will be assumed by the Deputy Secretary-General.

Section Six: Procedures for Amending this Charter

Article Forty-Five: This Charter can be amended only when a motion for amendment is brought forth by one-half of the members of two-thirds of the Council members.

Article Forty-Six: The amended version of this Charter can be submitted to the Annual Meeting for review only when it has been approved through a vote at the Council meeting.

Article Forty-Seven: The amended Charter must be approved at the Member Meeting, then be submitted to the Chamber of Commerce for review within fifteen days after approval, and takes effect when consent is obtained from the Chamber of Commerce.

Section Seven: Dissolution Process

Article Forty-Eight: When the Subcommittee needs to be dissolved for reasons such as completion of its mission, voluntary dissolution, splitting or merger, the Council needs to bring forth a motion for dissolution.

Article Forty-Nine: The motion for dissolution of the Subcommittee must be approved through a vote at the Member Meeting, and submitted to the Chamber and the supervising department at the Ministry of Foreign Trade and Economic Cooperation for review and approval.

Article Fifty: The Subcommittee is dissolved after the state social organization administration department completes the formal procedures for its dissolution.

Section Eight: Supplementary Articles

Article Fifty-One: No independent financial department shall be set up for the Subcommittee; its working funds will be collected and spent by the Subcommittee.

Article Fifty-Two: In order to monitor the implementation of industry self-disciplinary agreements, coordination plans, or industry resolutions, upon approval by relevant members, the Subcommittee can collect a security deposit in a specified amount for breach of agreement. The specific collection and expenditure method shall be separately formulated at the Subcommittee Annual Meeting, the Interim Meeting and the Council.

Article Fifty-Three: This Charter was approved by members through a vote on June 7, 2002.

Article Fifty-Four: The right to interpret this Charter belongs to the Subcommittee Council.

Article Fifty-Five: This Charter takes effect on the date on which it is reviewed and approved by the Chamber of Commerce.

Appendix 3:

I. List of Newly appointed Council Members:

1. Northeast Pharmaceutical Group
2. Jiangsu Jiangshan
3. Weisheng (Shijianzhuang) Pharmaceutical
4. Hebei Welcome Pharmaceutical Company
5. Director Qiao Haili, Western Medicine Department, China Chamber of Commerce of Medicines and Health Products Importers and Exporters

II. List of Subcommittee Investigative Group Members:

1. Director: Director Qiao Haili, Western Medicine Department, China Chamber of Commerce of Medicines and Health Products Importers and Exporters
2. Members: Jiangxi Medicines and Health Products Import and Export Corporation

   China Medicines and Health Products Import and Export Corporation

CHAMBER OF COMMERCE MEETING MINUTES, DATED DECEMBER 23, 2005

CHAMBER OF COMMERCE MEETING MINUTES

Date: Friday, December 23, 2005

Location: Chamber of Commerce Beijing meeting room

Attendees: Chamber of Commerce - Director Qiao Haili
Welcome - Huang Pingqi, Zhang Yingren
Weisheng - Feng Zhenying, Wang Yeguang
Northeast - Du Chengyang, Wang Renzhi, An Xiaoxia
Hualong - Liu Lei, Feng ? (daughter of Feng Yanming)
Anhui Tiger - Director Wu, Gong Qingchuan (Tiger Xinzhou)
Jiangshan - Director Kong, Wang Qi

[Not Translated]

2. Arrangement to suspend production:

- Time of suspension of production: Northeast will suspend its production no later than May; the other 5 companies must arrange for the suspension of production between April 1-15. The specific date to commerce suspension can be self-determined, but they must be reported to Director Qiao of Chamber of Commerce in advance.
- Duration of suspension of production: Jiangshan will suspend its production for 47 days; the other 5 will suspend production for 40 days.
- Definition of suspension of production: the air compressor of the fermentation machines shall be switched off.

- Inspection mechanism; Northeast and Weisheng shall inspect one another; Hualong shall inspect Jiangshan; Jiangshan shall inspect Welcome; Welcome shall inspect Hualong.
- Penalty for violations: If production is not suspended in accordance with the schedule, the Chamber of Commerce will stop issuing export verification and approval seals until the enterprise suspends its production.

3. Market coordination measures

- Between January 1-15, 2006, each of these companies is prohibited from issuing price quotes to external parties (including foreign clients and foreign trade companies); after that time, all of the price quotes must exceed US$3 .35/kg. If any of the companies is found to quote a lower price, the sales manager of that company must report to the Chamber of Commerce to provide an explanation; otherwise, verification and chop will not be issued.
- Any company with pre-existing contracts with a price lower than US$3.35/kg must file a report with the Chamber of Commerce by December 31.

[Not Translated]

Drafted by: Wang Qi

cc: Director Kong, Director Wang

REPORT OF DR. PAULA STERN, DATED JUNE 5, 2009

Report of Dr. Paula Stern

Introduction

I, Paula Stern, hereby state and declare that:

(1) I am the Chairwoman of The Stern Group, Inc., a Washington, D.C.-based international policy advisory firm, and I have been retained by the Plaintiffs in this case to furnish my opinion in this Report as a trade policy and international economics expert. My resume (attached as Exhibit A) provides my educational background, including a B.A. from Goucher College; M.A. from Harvard University; and an M.A., M.A.L.D., and Ph.D. from Tufts University's Fletcher School of Law and Diplomacy.

(2) I am a former Commissioner (1978-1987) and Chairwoman (1984-86) of the United States International Trade Commission ("ITC"). From 1993-2003, I was a member of the President's Advisory Committee on Trade Policy and Negotiations (ACTPN) during the period when the US government was in negotiations with the People's Republic of China (PRC) regarding the market reforms the PRC needed to undertake as conditions for gaining accession to the World Trade Organization (WTO). From 1997-2000, I was co-chair of the International Competition Policy Advisory Committee (ICPAC) for the United States Attorney General and the Antitrust Division of the Department of Justice. On February 28, 2000, ICPAC issued its final report which included proposals for reforming U.S. international competition policymaking including actions to enhance multilateral cooperation to

prosecute international cartels.[1] In February 2001, at the invitation of the PRC I participated in a Beijing planning session of international trade and economic policy experts in preparation for the Asia Pacific Economic Cooperation (APEC) forum's 9th annual Leaders Meeting, which the PRC hosted in Shanghai on October 20-21, 2001. On December 1, 2004, I provided expert testimony on behalf of The Coalition of Shrimp Exporters/Producers of South China in "Certain Frozen and Canned Warm-water Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand and Vietnam," ITC antidumping investigation numbers 731-TA-1063-1068.

(3) In light of the report of Professor Shen Sibao, I submit this report to compare and contrast the public statements and written testimony by the government of the PRC regarding the role the state plays in China's economy. Specifically, PRC's Ministry of Commerce[2] (MOFCOM) made representations to the Court in this case that it mandated China's vitamin C (VC) producers to coordinate prices for their exports. This "compulsion" notion contradicts official PRC statements issued repeatedly and consistently that assert that the Chinese economy is no longer a state dictated, managed economy but rather

1. *See* Chapter 4 of ICPAC Report entitled "International Anticartel Enforcement and Interagency Enforcement Cooperation." <http://www.usdoj.gov/atr/icpac/finalreport.htm>

2. The Ministry of Commerce is also known as MOFCOM (Ministry of Commerce of the People's Republic of China); before 2002 MOFCOME was known as MOFTEC (Ministry of Foreign Trade and Economic Cooperation).

through thirty years of "reform and opening up"[3] China has achieved the status of a market economy wherein individuals and enterprises make independent market driven decisions regarding pricing and other market choices.

(4) In undertaking this assignment, I have reviewed Defendant's Motion to Dismiss, the Amicus Curiae Brief ("Amicus Brief") and supporting exhibits, the Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss, the Memorandum and Order on Motion to Dismiss, the Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss, the Plaintiff's Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss, the Defendants' Response to Plaintiffs Supplemental Memorandum in Opposition to Motion to Dismiss, the Ministry of Commerce of the PRC Response to the Supplemental Opposition to Motion to Dismiss, the Declaration of Professor James V. Feinerman dated August 15, 2006 ("Feinerman Declaration"), Expert Report of Professor Shen Sibao dated February 19, 2009 ("Sibao Report"), and the Expert Report of Professor James B. Speta dated February 20, 2009 ("Speta Report"). I have also reviewed documents filed by the PRC's MOFCOM at the WTO, U.S. Department of Commerce (DoC) and the European Commission (EC) Furthermore, I have reviewed public speeches and authorized statements attributed to high ranking government officials of the People's Republic of China. (See Exhibit B)

(5) The organizational approach I undertook for this assignment was to review the Sibao report as well as the

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3. *See* World Trade Organization, *Trade Policy Review Report by the People's Republic of China*, WT/TPR/G/161 (Geneva, 2006) p.6

defendants' assertions to the court that the PRC not only condoned but also mandated and enforced the formation and operation of a cartel among China's domestic VC exporters.[4] I then compared those statements with official statements that MOFCOM and other official representatives of the PRC have made before the WTO, the DoC and EC that China is a "socialist market economy" and should be treated by its WTO trading partners as a market economy.[5] The PRC has consistently and repeatedly argued that for decades its "reform and opening-up" at home and compliance with WTO articles of accession vis-à-vis its fellow WTO members support its claim to be a market economy. The PRC has also made similar arguments regarding its claim that Chinese enterprises and the Chinese economy should be treated as a market economy for purposes of the WTO sanctioned antidumping law.[6]

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4. *See* Amicus Brief., 5-6. *See* also Report by Professor Shen Sibao 19-23.

5. *See* Huang, Yong. "Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law," *Antitrust Law Journal* 75:117 (2008): 3 Huang writes, "Although 'socialist market economy' is a politically sensitive phrase, it is still a 'market economy'." *See* also European Parliament – Committee on International Trade, *Market Economy Status and the People's Republic of China*, CM/598044EN.doc (Strasbourg, 2006) Also *see* Huang, Yong. "Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law," *Antitrust Law Journal* 75:117 (2008): 3 Huang writes, "Although 'socialist market economy' is a politically sensitive phrase, it is still a 'market economy'."

6. To sell at "dumped prices" means to sell below the cost of production or below home prices. If an industry in a WTO member state can demonstrate that imports from China are being sold

at "dumped" prices and are causing "material injury," then the government authorities of that member state can impose dumping duties. Many Chinese industries have been the subject of numerous dumping complaints in the United States. These cases are costly to defend, and consequently the PRC, the Chambers of Commerce, and individual enterprises have learned over the years to avoid so called "unfair" or "dumped" prices on their exported goods in order to avert importing countries' issuing anti-dumping duties on Chinese imports.

From the time of its accession Chinese authorities have been concerned about the way in which the antidumping laws would be applied. In 2001 the WTO addressed this matter: **"Price Comparability in Determining Subsidies and Dumping:** Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese Origin into a WTO Member consistent with the following (i) If the producers under investigation can clearly show that **market economy** conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability; (ii) The importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China **if the producers under investigation cannot clearly show that market economy conditions prevail in the industry** producing the like product with regard to manufacture, production and sale of that product...(d) Once China has established, under the national law of the importing WTO Member, that it is a **market economy**, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains **market economy criteria** as of the date of accession....In addition, should China establish, pursuant to the national law of importing WTO Member,

(6) This year marks the thirtieth anniversary of the beginning of market reform in the PRC. The PRC achieved sufficient reform in December, 2001, to convince the membership of the WTO to permit the PRC to accede to the WTO. Since then, China has maintained its WTO obligations to continue its market reforms. Furthermore, it has carried out a concerted campaign to be treated as a market economy for the purposes of the WTO sanctioned anti-dumping and countervailing duty laws. To date, its arguments have convinced 91 Members of the World Trade Organization to grant the PRC market economy status.[7] In 2006, the United States Department of Commerce

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that **market economy** conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector." (*See* World Trade Organization, *Accession of the People's Republic of China*, WT/L/432 (Geneva, 2001) p.8-9)

Again, the WTO in 2008 in its Trade Policy Review cited that, "For 13 consecutive years from 1999 to 2007, China has been subject to the largest number of antidumping actions in the world. While China's merchandise exports only accounted for 6% of the world's total, the proportion of anti-dumping cases against China accounted for 15.6% of all the antidumping measures by the WTO Members. From 2006 to 2007, the number of antidumping actions against China was as high as 126. During the same period, 10 countervailing investigations were also initiated against China, making China the largest target of countervailing measures as well." World Trade Organization, *Trade Policy Review Report by China*, WT/TPR/G/199 (Geneva, 2008) p. 14 (emphasis added)

7. "China still striving for 'market economy' status from the EU," *China View*, May 21, 2009, <http://news.xinhuanet.com/english/2009-05/21/content_11415493.htm>

established a new policy of treating the PRC as a market economy for purposes of the countervailing duty law. The DoC continues to take into consideration – but nonetheless rejects – the PRC's market economy claims in individual dumping litigation.[8] Additionally, the European Union has under active review an internal report which notes China's "considerable progress" towards attaining market economy status for purposes of the trade laws.[9]

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8. *See* Bown, Chad. "U.S.-China Trade Conflicts and the Future of the WTO." *The Fletcher Forum of World Affairs*. 33:1 (2009): 44. Chad Bown notes that "the China-U.S. *AD/CVD* dispute stems from a U.S. trade policy decision made in March 2007, when the Bush administration reversed a 23-year-old U.S. policy that refused calls under the countervailing duty – or anti-subsidy – law for new tariffs against exports from China and other non-market economies (NME's). This policy reversal introduced a troubling inconsistency across U.S. unfair trade laws with particularly onerous implications for China. While China continues to be treated as a NME under U.S. antidumping law – so that the U.S. Department of Commerce has additional discretion with which to construct punitive duties – it is treated as a market economy under the U.S. countervailing duty law, so that it can potentially face trade restrictions under that policy as well....Part of Beijing's argument in this *AC/CVD* dispute may be such a challenge to U.S. policy. The United States has initiated at least fourteen new countervailing duty investigations against a wide range of Chinese products since the March 2007 decision, and a number of them (e.g., steel pipe and tube, tires, and laminated sacks) have resulted in new U.S. import barriers that China cites in its WTO dispute initiation request." For a full press release from the Department of Commerce see <http://www.commerce.gov/opa/press/Secretary_Gutierrez/2007_Releases/March/30_Gutierrez_China_Anti-subsidy_law_application.rls.html>

9. "EU 'sees progress' by China on market economy status," *EU Business*, Sept. 18, 2008, <http://www.eubusiness.com/news-eu/1221733922.11/>

Summary of Conclusions:

(7) In his order that denies the defendants' motion to dismiss, Judge Trager observes "[T]he parties hotly contest both the origin and even existence of government compulsion."[10] Furthermore, he states that "If defendants wished to form a cartel, they would have had to ask for a government sanction..."[11] Indeed, "[I]t is not clear that this scenario of defendants making their own choices and then asking for the government's imprimatur – which may or may not have occurred in this case – would qualify as the type of governmental act or compulsion contemplated by the defences raised by the defendants."[12]

(8) Further, the Court opines, "The defendants and the Ministry stress the importance to China of being able to manage the transition from a command to a market economy."[13] In addition, the judge stated, "The Ministry's Brief is, therefore, entitled to substantial deference, but will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position."[14]

(9) There is another whole body of documents that, to borrow Judge Trager's words, "contradicts the Ministry's

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10. *In RE Vitamin C Antitrust Litigation*, E.D. N.Y. 1, 20 (2008).

11. *In RE Vit.* E.D. U.S., 1 at 30

12. *In RE Vit.* E.D. U.S., 1 at 30

13. *In RE Vit.* E.D. U.S., 1 at 31

14. *In RE Vit.* E.D. U.S., 1 at 25

position." The primary purpose of my testimony is to bring to the court's attention where the defendants' briefs are contradicted by numerous other statements issued by the PRC. The compulsion argument of the Amicus Brief filed by MOFCOM and Professor Shen Sibao contradicts official Chinese government public pronouncements made elsewhere which assert that China has undertaken international trade law obligations and has transitioned to a market economy.

(10) The PRC has pursued a vigorous campaign to convince its trading partners and its fellow members of the WTO, post formal accession, that it has attained market economy status.[15] This position starkly contrasts with the Minister of Commerce's testimony in this case that it compelled the VC producers to fix higher prices. The PRC joined the WTO in 2001 as its 143rd member after 15 years of arduous negotiations with the United States, the European Union, Mexico, and effectively the totality of the World Trade Organization membership. At that time, China pledged to continue making reforms to move the government out of a command and control position and toward a market economy. These commitments were made to ensure that

15. Professor Chad Bown notes that "China took on a number of such commitments as a condition of its WTO entry in 2001 ... It promised to continue privatization of state-owned enterprises (SOEs)....These commitment promised implicit benefits to other WTO members, as well as serving to complement unilateral efforts – to promote market oriented reforms in its domestic economy....As a price for China's accession, the membership demanded that Beijing take on many more policy commitments than had traditionally been required of other acceding countries at a comparable stage of economic development." Bown, Chad. "U.S.-China Trade Conflicts." *The Fletcher Forum of World Affairs*. (2009): 32-33.

China's private citizens and enterprises are able to make unrestrained, individual economic decisions. To quote one scholar, "China has lived up and perhaps even exceeded the pace of certain reform demands."[16]

(11) For the defendants in this case to suggest that the Chinese government compelled the VC producers to participate in an export cartel is to contradict the official assurances given by the PRC at the time of its WTO accession in 2001 and to contradict numerous statements made since. Taken together or separately, these statements provide a picture of an economic regulatory policy that reduces the role of government in setting prices, encourages competition in the marketplace, and permits "voluntariness of defendants' actions."[17]

(12) In particular Professor Sibao's assertions of a government compelled cartel stand in stark contradiction to official public statements made elsewhere by the PRC. Most of Professor Sibao's argument relies on documents that come from an historical timeframe that predates the timeframe covered in this case. He does not however, make the compulsion argument in his reference to the post 2001 verification and chop system. He states "The Chamber's legal authority to review and place its "chop" of approval on a manufacturer's export contract is one of many indicia of the governmental authority that MOFCOM delegated to the Chamber to regulate the Vitamin C industry."[18] He continues, "**China's accession to the WTO, did not in any**

16. Ibid., 33

17. This term comes from the memorandum and opinion of Judge Trager.

18. *See* Report of Professor Shen Sibao, 19 Feb, 2009, p. 19

way change the level of control that the government maintained over the vitamin C industry....the Vitamin C Subcommittee remained a government-authorized coordination organization, within the Chamber, which was set up in accordance with national regulations and policies and was delegated with authority to regulate export on behalf of the government. The price-coordinating meetings and industry-wide agreement regarding production cutbacks, export quotas and other measures that were facilitated by the Vitamin C Subcommittee continued to serve to advance national interests...and to maintain the proper export order with which the government was concerned."[19] Professor Sibao continues stating that "Plaintiffs misunderstand China's export regulatory system. Chinese laws and regulations put in place a **mandatory** 'industry coordination' process for exports of important national interest....Once appropriate measures (such as quotas, **price** or volume restriction, or mandated joint activities) are adopted by the Chamber, such measures become **mandatory** as a matter of Chinese law and regulatory practices."[20]

(13) The documented official PRC statements below are intended to assist the court in its "further inquiry" to show that the "compulsion" argument in this case is contradictory. They stand in stark contrast to the statements provided by the Chinese government in the Amicus Brief and Professor Sibao's Report. These statements are indicative of China's solid commitment to "opening up" its economy and ensuring that the PRC

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19. Ibid., 19-20

20. Ibid., 21 For further evidence see Professor Sibao's report from page 19-23.

maintain its international commitments, in particular the commitments codified under its accession agreement with the WTO:

1) **WTO Related Documents:**

- (2001) "China shall, subject to paragraph 2 below, **allow prices for traded goods and services in every sector to be determined by market forces**, and multi-tier pricing practices for such goods and services shall be eliminated. The goods and services listed in Annex 4 may be subject to price controls, consistent with the WTO Agreement, in particular Article III of the GATT 1994 and Annex 2, paragraphs 3 and 4 of the Agreement on Agriculture. Except in exceptional circumstances, and **subject to notifications to the WTO, price controls shall not be extended to goods or services** beyond those listed in Annex 4, and **China shall make best efforts to reduce and eliminate these controls.** China shall publish in the official journal the list of goods and services subject to state pricing and changes thereto."[21]

- (2001) "The representative of China stated that in formulating government prices and government guidance prices, the following criteria were taken into account: normal production costs, supply and demand situation, relevant government policies and prices of related products. When fixing prices of consumer goods, consideration was given to the limits of consumers' purchasing power. He noted that due to continued reform of China's price system, the **share**

21. World Trade Organization, *Accession of the People's Republic of China*, WT/L/432 (Geneva, 2001) p. 6 (emphasis added)

of government prices had dropped substantially and that of market-regulated prices had increased; of social retailing products, the share of government prices was about 4 per cent that of governmental guidance prices 1.2 percent **and that of market-regulated prices 94.7 per cent**....The share of directly government controlled prices has **been much reduced. China's price system was becoming increasingly rationalized, creating a relatively fair marketplace for all enterprises to compete on an equal footing."**[22]

- (2001) "The representative of China confirmed that it would publish in the official journal the list of goods and services subject to state pricing and changes thereto, together with the price-setting mechanisms and policies...The representative of China confirmed that the official journal providing price information was the Pricing Monthly of the People's Republic of China, published in Beijing. It was a monthly magazine listing all products and services priced by the state."[23]

- (2001) **"The representative of China noted** that the Government of China **encouraged fair competition and was against acts of unfair competition of all kinds."**[24]

- (2006) **"Reform and opening up is China's established national policy.** The market-oriented reform started in 1979 brought about dramatic changes in China's

22. World Trade Organization, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (Geneva, 2001) p. 11 (emphasis added)

23. Ibid., 12

24. Ibid., (emphasis added)

economic system. In October 1992, China officially set the objective of establishing a socialist market economy system. Subsequently an overall economic system reform was unfolded and major breakthrough was made in the fiscal, taxation, financial, investment, foreign exchange, foreign trade and pricing system, which laid a solid foundation for a socialist market economy system. **Up to 2000, a socialist market economy system had already taken shape and China entered a new stage of improving the system."**[25]

- (2006) "In respect of the **non-public sector** development, the *Constitution of the People's Republic of China* as amended in March 1999 and March 2004 provides in Article 11 that the non-public sectors prescribed by law, constitute an important component of the socialist market economy; the state **protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors**....In China today, the **non-public sector consists of foreign invested enterprises, self-employed individual industrial and commercial households and private enterprises."**[26]

- (2006) "China's accession to the WTO in December 2001 **marked a new era of China's opening up. After WTO accession, the regional opening up approach was replaced by a nation-wide open policy; the coverage extended from the traditional trade in goods to**

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25. World Trade Organization, *Trade Policy Review Report by the People's Republic of China*, WT/TPR/G/161 (Geneva, 2006) p. 6 (emphasis added)

26. Ibid., 6 (emphasis added)

trade in services; the level of market access further advanced access conditions codified into laws and regulations with great transparency and rule-based. The WTO fundamental principles such as MFN and national treatment as well as **China's WTO accession commitments have become the norms followed by China in the opening process."**[27]

- (2006) **"Opening up is China's long term basic national policy.** The Chinese Government adheres to the 'mutually beneficial win-for-all' opening strategy, and takes the pursuance of national interests and promotion of common development as the basic principles in handling economic and trade relations with all countries and economies."[28]

- (2006) "China's objective in building a socialist market economy system and its **fundamental policies of reform and opening-up match with the basic principles of the multilateral trading system based on market economy**....Ever since WTO accession China has abided by WTO rules, lived up to the extensive commitments made in the accession and made comprehensive adjustment of its trade regime and trade policy....**Before and after the accession, China systematically overhauled existing laws, administrative regulations and department rules to comply with WTO rules and accession commitments. From the end of 1999 to the end of 2005, the Central Government adopted, revised or abolished more than 2,000 pieces of laws, administrative regulations**

27. Ibid., 8 (emphasis added)

28. Ibid., 11 (emphasis added)

and department rules....The adoption, revision, and abolishment of laws, administrative regulations and department rules in this overhaul ensure the consistency of China's trade regime with the WTO rules and accession commitments."[29]

- (2006) "Deepen the Reform and Raise Further the Level of Opening: All the achievements that have been made in China's economic and social development are closely linked with the reform and open policy. In the process of future development, the Chinese Government **will persist in the reform and open policy, continue to improve the market economy system and further raise the level of opening up policy.**"[30]

2) **WTO Statements Extended to Vitamin C:**

- (2002) "China maintains export administration of a small number of products for the purposes of protecting public interest, avoiding shortage in domestic supply, conserving the exhaustible natural resources, or undertaking the obligations under international treaties or intergovernmental agreements, which are in conformity to GATT 1994. From 1 January 2002, China gave up export administration of Chinese chestnut, reed mat, red bean, honey, colophony, tung wood and the board (to Japan), **vitamin C** ect. There are still 54 products subject to export administration, including live bovine and beef (to Hong Kong, China and Macao, China), fowls and meat (to Hong Kong, China and Macao, China), garlic tea, wheat, corn, rice, liquorices roots

29. Ibid., 12 (emphasis added)

30. Ibid., 21 (emphasis added)

and their products, rushes and their products, sugar, bauxite, light (dead)-burned magnesia, talc, flourspar, rare earth, tungsten ores and products, antimony ores and products, tin, zinc, coal, coke, crude oil, processes oil, paraffin wax, artificial corundum, heavy water, ozonosphere depleting materials, chemicals under supervision and control, chemicals used to produce narcotics, swan wood, silk, greige, cotton, woven fabrics, silver, platinum, certain steel products (to the U.S.), and etc. These export administrative measures have been notified to the WTO."[31]

- (2002) "**Export price of state trading enterprises is decided by the enterprises themselves.** It is usually constructed based on such costs as domestic procurement prices plus circulation costs (including warehousing, transportation, bank interests, and inspection fees etc.) with prices of the international markets taken account of as reference. According to the *Law of Pricing of People's Republic of China* and Annex 4 of the accession protocol, only a small number of commodities and services are subject to the government pricing or the enterprises. Apart from those stipulated few, the prices of the rest (sic) commodities and services are determined by the market forces."[32]

- (2006) "On 1 January 2002, China abolished export quotas and licenses for, *inter alia*, Chinese chestnuts,

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31. World Trade Organization, *Statement by the Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade and Goods*, G/C/W/441 (Geneva, 2002) (emphasis added)

32. Ibid. (emphasis added)

reed mats, red beans, colophony, tung wood and board (to Japan) and **Vitamin C.**"[33]

3) **Statements by prominent Chinese officials guiding PRC toward a market economy:**

Vice Minister of Commerce Yi Xiaozhun. At the time Mr. Yi Xiaozhun was the Vice Minister of Commerce of the PRC.[34]

- (2006) "Madame Chairperson, on 11 December 2001, China became a WTO member after 15 years of lengthy negotiations. In the four years after its accession, China has continued unswervingly the basic state policy of reform and opening-up initiated in 1979 and implemented a wide range of commitments made upon its accession. **China has set up a system of market economy. Its market has been widely opened...**"[35]

- (2006) "Madame Chairperson, as it sets national policy, China would continue to **deepen its reform and opening-up** by balancing domestic development with the needs of **opening up**, China would continue to

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33. World Trade Organization, *Trade Policy Review*, WT/TPR/S/161Rev.1, (Geneva, 2006).

34. His portfolio covers the Department of International Trade and Economic Affairs, Department of WTO Affairs, and China Asia-Pacific Association for Promoting Economic and Trade Cooperation.

35. Vice Minister Yi Xiaozhun, *Statement to the First WTO Trade Policy Review of China*, 19 April 2006. <http://english.hbdofcom.gov/cn/file/2006/4-30/11638.html> (emphasis added)

pursue the opening-up strategy under the principles of mutual benefits for win-win results."[36]

- (2007) "It was a great event of historical significance in the course of China's reform and opening up. It was a result of major strategic decision of the Central Party Committee and the State Council made on the basis of their foresightedness and correct judgment on the global developments in the current era to actively meet the challenges of economic globalization."[37]

Mr. Long Yongtu. At the time Mr. Yongtu was the Director General at the Ministry of Foreign Economic Relations and Trade.[38]

- (2000) "China will abide by its commitments made in the bilateral and multilateral negotiations. We are convinced that the observance of these commitments will benefit all the Members of the WTO, will first

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36. Ibid. (emphasis added)

37. Vice Minister Yi Xiaozhun, *Speech Addressing the Opening Ceremony of the Special report on the 5th Anniversary of China's Accession to the WTO*, 22 Feb. 2007. <http://vienna2.mofcom.gov.cn.column/print.shtml?/aboutchina/200702/20070204394121>

38. From 1993-2002 Mr. Long Yongtu was the Director General at the Ministry of Foreign Economic Relations and Trade (MFERT). From 2002-2003 Mr. Yongtu served as Vice Minister in MFERT. He holds the position of Secretary General of the Boao Forum for Asia is a non-governmental non-profit international organization for leaders in government, business, and academia in Asia.

and foremost benefit China in the implementation of its reform and opening up policy."[39]

Shi Guangsheng. At the time Mr. Guangsheng was the Minister of Foreign Trade and Economic Cooperation, a post which he has held since 1998.

- (2000) "Joining the WTO is the requirement of our reform and **opening up** which is in the fundamental interest of China."[40]

- (2000) "After achieving its membership in the WTO, **China will open wider to the outside world with a more active attitude**, which constitutes an important step of China's energetic participation in the economic globalization....China will strictly abide by the WTO rules and honor its commitments. At present, China is, in line with the WTO rules and the requirement of establishing socialist market economic system, **conducting a thorough checking-up of the laws and regulations concerning foreign trade and economic cooperation and will make an amendment and addition to the legal procedures**, speeding up the establishment and improvement of

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39. H.E. Vice Minister LONG Yongtu, *Statement to the Head of the Chinese Delegation at the 13th Session of the Working Party on China*, 19 April 2000. <http://china-un.ch/eng/gjhyfy/hy2000/t85631.htm>

40. Shi Guangsheng, *Speech at Luncheon of the 21st Century Forum by Minister for Foreign Trade and Economic Cooperation*, "China's Accession to WTO and Participation in Economic Globalization", 16 June 2000. <http://english/mofcom.gov.cn/column/print.shtml?/translatorsgarden/famousspeech/200803> (emphasis added)

foreign-related economic administration system in conformity with the international practice....therefore get well prepared for the more fierce international competition."[41]

4) **Authorized Comments filed by the PRC at the US Department of Commerce re Market Economy Status:**

- (2004) "[I]t is time for the United States to change its designation of China as (sic) nonmarket economy and to recognize China as market economy....I would like to clarify some points with regard to China's WTO accession agreement... the agreement specifically provides that countries such as the United State are required to stop treating China as a nonmarket economy once China establishes a market economy without waiting until the end of 15 years....**The fact is China has changed and it has changed a lot.** Since, China has become a WTO member people have witnessed a lot of new developments which included constitutional recognition of new developments and protection of property rights, dramatic restructuring, reorganization and reduction of state-owned enterprises, **rising dominance of the private sector** in the Chinese economy, and further opening up to foreign investment ... treating China as a market economy, not only benefits China, but also benefits the United States."[42]

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41. Ibid. (emphasis added)

42. International Trade Administration Import Administration, Department of Commerce, *US-China Joint Commission on Commerce and Trade Working Group on*

- (2004) "China asks the United States to modify its NME (non-market economy) policy at this time.... This modification of current policy would constitute an important step in the United States bringing its AD [antidumping] law into compliance with its international obligations, until such time as China is treated as a market economy."[43]

- (2004) "China has made significant strides in transforming its economy from the centrally **planned and controlled economy** of decades ago. 'China's dramatic economy growth stems from its **opening of its economy to private enterprise and market forces**.' The Chinese economy is operating **on the basis of market principles to a sufficient extent**..."[44]

- (2004) "China looks forward to working with Department [U.S. Department of Commerce] officials in modifying current law by treating China as a **market economy** for antidumping purposes."[45]

Structural Issues, Remarks by Mr. Dai Yunlou, Minister Counsellor, Embassy of China, 3 June 2004, 40-46. (emphasis added)

43. *See* comments of Bruce Mitchell and Ned Marshak to U.S. Department of Commerce Assistant Secretary for Import Administration, Re: Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries on behalf of Bureau of Free Trade for Imports and Exports (BOFT), 1 June 2004, at p. 16-17

44. Ibid. (emphasis added)

45. Ibid., 40 (emphasis added)

- (2004) "**China has become a market economy.** China is entitled to market economy treatment in AD [antidumping] proceedings."[46]

- (2004) China's economy today is very different from the **centrally planned and controlled economy of decades ago.** Other countries including **New Zealand and Singapore, have recently reviewed the vast reforms and extensive restructuring that have occurred in China's economy and have decided that they will no longer treat China as a NME for antidumping purposes.**"[47]

- (2004) "China began its transition from a centrally planned economy under the leadership of the late Deng Xiaoping in 1978...**China made a decision to reform its economic system toward a market economy.** In October 1992, China made explicit that the objective of China's economic reforms was to establish a market economy system. In 2002, China proclaimed to the world that China has established a preliminary system of market economy. Along with the systemic transition, China has made **phenomenal progress in market liberalization and economic growth.** Developments have included the following: recognition and protection of property rights, restructuring, reorganization, and **reduction of state-owned enterprises, dominance**

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46. Ibid., 10 (emphasis added)

47. *See* comments of Wang Shichun, Director General BOFT Re: Public Hearings on U.S. China Joint Commission on Commerce and Trade Working Group on Structural Issues on Recognition of China as a Market Economy for Purposes of U.S. Antidumping Law, 19 May 2004, at p. 1 (emphasis added)

of private sector and private control over means of production and pricing, decrease of state control and administration over economic affairs."[48]

- (2004) "The Chinese Government has significantly decreased its ownership and control of the means of production. The government does not control the production of goods, except for a limited number of items of strategic importance or of particular importance to the public welfare....The emergence of a substantial and vibrant private sector ... is further evidence that **the government now maintains limited ownership or control over the means of production."**[49]

- (2004) "For the vast majority of products and services, the market, not the government, decides the allocation of resources, and enterprises make their price and output decisions **based on market considerations** ... the Chinese government reserves the right of state trading or designated trading and of setting or issuing guidance on prices for a very **limited** number of products and services, which are either of strategic significance or of particular importance to the public welfare. It has consistently been the Chinese Government's policy to accelerate market reform and promote the growth of the private sector."[50]

- (2004) "[T]he Chinese economy is operating on the basis of **market principles** to a sufficient extent that the domestic prices and costs of its enterprises can

48. Ibid., 4 (emphasis added)

49. Ibid., 7-8 (emphasis added)

50. Ibid. (emphasis added)

reasonably be used as a basis for calculating normal value..."[51]

- (2007) "CCCMC [China Chamber of Commerce, Metals and Chemicals Imports and Exports] submits that the Department's [Department of Commerce] current presumption is completely at odds with *more recent* factual findings that the Commerce Department itself has made about China's "present-day" 2006-2007 economy. The more recent factual findings include the following: '(1) The PRC government has undertaken significant reforms to promote the introduction of market forces into the economy'

  '(2) [P]rivate industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing... the role of central planners is vastly smaller.'

  '(3) The PRC Government has eliminated price *controls* on most products; **market forces to determine prices of more than 90 percent of products traded in China**.'

  '(4) Many business entities in present-day China are generally free to direct most aspects of their operations, and to respond to (albeit limited) market forces.'

  '(5) Starting in the 1990's the PRC Government began to allow the development of a private industrial sector, which today dominates most of the industries in the PRC in which the Government has not explicitly preserved a leading role for SOE's [State Owned Enterprises]'

51. Ibid., 9 (emphasis added)

'(6) The **PRC Government has dismantled its monopoly over foreign trade** and finally extended trading rights to all FIE's in accordance with its WTO accession obligations.'"[52]

- (2007) "The Government of China, both in law and practice, **guarantees the ability of private** and foreign-owned enterprises **to operate freely, notwithstanding regulations typical of market economy countries.**"[53]
- (2007) "its [MOFCOM] belief that China should have been treated as a market economy in all ADD (antidumping duty) proceedings."[54]
- (2007) "MOFCOM again asks that the Department calculate Chinese ADD rates based on market economy principles to the maximum extent allowed by law."[55]

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52. *See* comments by Bruce Mitchell and Ned Marshak to Department of Commerce Assistant Secretary for Import Administration, April 20, 2007, Re: Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates on behalf of People's Republic of China Ministry of Commerce (MOFCOM) at p. 6-7 (emphasis in bold added; italics in original)

53. Ibid., 19 (emphasis added)

54. *See* comments by William Barringer, Daniel Porter and Matthew Nicely, June 25, 2007, Re: Response to the Department of Commerce's Request for Comments on Market Economy Treatment for Individual Respondents in Antidumping Proceedings Involving China at p. 4 (emphasis added)

55. Ibid., 7

- (2007) "MOFCOM has strongly protested the application of the CVD [countervailing duty] law to Chinese exports. If the Department persists in refusing to recognize that China is a market economy for ADD purposes, it cannot assess countervailing duties on Chinese exports; on the other hand, if the Department concludes that China, in fact, is a market economy whose exports are subject to the CVD law, then it must calculate ADD based on market economy principles."[56]

- (2007) "As admitted by the DOC in its recent findings on China's economic development, the **progress of China towards a market economy has been accomplished** in most sectors of the economy and with respect to most costs and **prices**."[57]

- "For quite a long time, the US and China have held different opinions on China's market economy status. **It is a prejudice against Chinese respondents that DOC refuses to recognize China's market economy status**...It is well known China has established a **market economy system over the past 20 years. The Government, at both national and local levels, has faded out from direct involvement in the management of enterprises and become a macro regulator.**"[58]

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56. Ibid., 11

57. *See* Comments of the Bureau of Fair Trade for Imports and Exports (BOFT) of the Ministry of Commerce (MOFCOM) of the People's Republic of China on Determination and Treatment of Market Oriented Enterprises to Assistant Secretary for Import Administration, 25 June 2007, at p. 3-4 (emphasis added)

58. *See* Comments of the China Chamber of Commerce of Metals, Minerals Chemicals Importers & Exporters on Market Oriented Enterprise, DC 728759v.1 (emphasis added)

- (2007) "[T]here is a sufficient market economy 'to determine whether the PRC Government has bestowed a {countervailable} benefit upon a Chinese producer,' it makes no logical or economic sense for the Commerce Department to designate China as a NME....**Over more than 20 years of accelerating reforms in its economic system, China has established a *bona fide* market economy system.** Such a market economy system is expressly written into the Chinese constitution. And indeed, by many accounts China has a more developed market economy system than some of the countries that the U.S. has recently designated as market economies."[59]

- (2007) "Since the October of 1992 when Chinese government established the objective of constructing the socialist market economy system, China has made phenomenal progress in her market-oriented reforms on economy for the past ten years. **The range of market mechanisms has been widened and the extent of it has been deepened. A market-economy system has been established in China.**"[60]

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59. *See* comments by Liu Danyang, Deputy Director BOFT Re: Commerce Department's *Second* Request for Comments Concerning Market Economy Treatment for Individual Respondents in Antidumping Proceedings Involving China to Assistant Secretary for Import Administration, 10 Dec. 2007, at p. 5-6 (emphasis added)

60. *See* comments by Liu Meikun, Vice President of China Chamber of Commerce for Imports and Exports of Machinery & Electronic Products (CCCME) Re: Comments in Response to Federal Register Notice, *Antidumping Methodologies*

5) European Commission policy on market economy status for the PRC:

The European Commission, like the U.S. Department of Commerce, has reviewed the PRC's demand that it be granted market economy status.[61] The following are officially authorized PRC statements arguing that the European Union should recognize that China is a market economy:

- (2004) "Over the past decade, China's gross domestic

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in Proceedings involving Certain Non-Market Economies: Market-Oriented Enterprise to Assistant Secretary for Import Administration, 18 June 2007, at p. 2 (emphasis added)

61. For greater detail see the following European Commission statements: "Soon after its accession to WTO, Beijing has started an impressive diplomatic campaign aiming at being recognized as a country worthy of equal status with the other players in the international economy. China claims that in light of the extent of its market reforms, refusal to grant MES [Market Economy Status] is discriminatory and no longer justified. Thus MES has clearly assumed a disproportionate place in China's foreign trade agenda." (European Parliament – Committee on International Trade, *Market Economy Status and the People's Republic of China*, CM/598044EN.doc (Strasbourg, 2006) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?ur=COM:2006:0631:FIN:EN:PDF>)

"Michael Pulch, Deputy Head of Delegation of the European Commission to China said that China had made tremendous economic progress since the reform and opening up drive that began 30 years ago." ("China still striving for 'market economy' status from EU," *China International Electronic Commerce Network*, May 22, 2009, <http://en.ec.com.cn/article/newsroom/newsroomtrade/200905/798932_1.html>)

product grew by more than 8 percent per year, and its foreign currency reserve exceeds 400 billion US dollars. Most economists agree that it is simply a matter of time until China's full market economy status is recognized by major economic powers. Some Chinese see US and EU reluctance to grant China full market economy status might result from the desire to hold the upper hand in negotiations over other issues, such as pressuring China to open its doors wider and faster in some industries."[62]

- (2009) "The Report on the Development of China's Market Economy 2005', which is released by economists in the Beijing Normal University, touches on many fields the United States and EU consider important for establishing a market economy.... Doctor Zeng Xuewen, one of the report's authors, says the report uses the market economy criteria adopted by the Europe and the US in anti-dumping and International Economic Freedom Index as part of the analysis. **Although the study shows China has already been a market economy, the United States and the European Union still refused to grant the country a 'market economy' status, a remedy for avoiding western anti-dumping investigations.**"[63]

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62. "Deng Xiaoping: Leading Thinker in China's Market Economy," *Xinhua News Agency*, Aug. 12, 2004, <http://www.china.org.cn/english/features/dengxiaoping/103785.htm>

63. "Study: China already a market economy," *China Daily Online*, Aug. 18, 2009, <http://www.chinadaily.com.cn/english/doc/2005-08/19/content_470566.htm> (emphasis added)

- (2009) "37 countries now regard China as a full market economy, declared Chinese Commerce Minister Bo Xilai recently ... Qin Chijiang, Vice Secretary-general of China Finance Society, is confident...**that after 25 years of reform, China has succeeded in building a market economic system. And it is the reality, he added.** China has **repeatedly urged the EU, its largest trade partner to solve the issue as early as possible.**"[64]
- (2009) "MOC [Ministry of Commerce] Minister Chen Deming stressed China was already a market economy during the China-EU High-level Economic and Trade Dialogue on May 7 and May 8."[65]

Compensation

Compensation for this engagement is based on the actual number of hours incurred at the hourly rate of the professionals assigned. The hourly rates for this engagement range from $185 to $600 per hour. My hourly rate on this assignment is $600. My compensation is not contingent on the outcome of this dispute.

Signature

/s/_____, June 5, 05/06/09

Paula Stern

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64. "37 countries regard China's market economy status," *People's Daily Online*, May 21, 2009, <http://www.chinadaily.com.cn/english/doc/2005-01/06/content_406523.htm> (emphasis added)

65. Ibid.

SUBMISSION OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA ON RECOGNITION OF CHINA AS A MARKET ECONOMY FOR PURPOSES OF U.S. ANTIDUMPING LAW, DATED MAY 19, 2004

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

May 19, 2004

Mr. James J. Jochum

Assistant Secretary for Import Administration

U.S. Department of Commerce

Central Records Unit, Room 1870

Pennsylvania Avenue and 14th Street NW

Washington, DC 20230

Re: Public Hearings on U.S.-China Joint Commission on Commerce and Trade Working Group on Structural Issues

Dear Assistant Secretary Jochum:

The Ministry of Commerce of the People's Republic of China hereby responds to the Department's May 3, 2004 Federal Register notice (69 Federal Resister 24,132) inviting comments and requests to testify concerning topics and issues for the U.S. - China Joint Commission on Commerce and Trade Working group on Structural Issues.

We attach an original and six copies of our written submission, as well as an electronic version on CD-ROM.

We, would appreciate the opportunity to make an oral presentation at the June 3 hearing. As requested in the notice, we provide below the name, address, telephone number, and position of the official who will be make a presentation on behalf of the People's Republic of China:

Dai Yunlou

The Economic and Commercial Counsellor

Embassy of the People's Republic of China

2133 Wisconsin Avenue, NW.

Washington D.C., 20007. U.S.A.

Tel: 001-202-625-3380, 001-202-625-3350

Fax: 001-202-337-5864, 001-202-625-3350

We also would appreciate the opportunity to extend the time for our presentation beyond the five-minute time limitation.

Sincerely,

/s/

Wang Shichun

Director General

Bureau of Fair Trade for Imports & Exports

Ministry of Commerce of P.R.C.

SUBMISSION OF

THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

ON

RECOGNITION OF CHINA AS A MARKET ECONOMY FOR PURPOSES OF U.S. ANTIDUMPING LAW

MAY 19, 2004

INTRODUCTION

The Government of the People's Republic of China appreciates the opportunity to make a presentation in the Department of Commerce's public proceeding to identify topics and issues for discussion in the U.S.-China Joint Commission on Commerce and Trade Working Group on Structural issues concerning China's desire no longer to be treated as a non-market economy ("NME") under U.S. antidumping law.

As has been widely recognized, China's economy today is very different from the centrally planned and controlled economy of decades ago. Other countries, including New Zealand[1] and Singapore, have recently reviewed the vast reforms and extensive restructuring that have occurred in China's economy and have decided that they will no longer treat China as an NME for antidumping purposes. Similarly, China should be recognized as a market

1. Rt. Hon. Helen Clark (Prime Minister of New Zealand), New Zealand and China to Work Towards FTA, April 14, 2004, available at *www.beehive.gov.nz/ViewDocument.cfm?DocumentID=19432* (last accessed on April 17, 2004).

economy for purposes of United States antidumping law. On this issue, the various relevant factors should be viewed within the framework of the overall development of China's economy and in light of the specific context and purpose of the antidumping rules in which the NME issue arises.

GENERAL PRINCIPLES

As members of the World Trade Organization, both China and the United States are committed to a rules-based system of international trade and dispute resolution. Within this system, antidumping duties and countervailing duties exist as exceptions to the general trading rules concerning most-favored nation tariff treatment and bound tariff rates. Those exceptions exist solely to provide a remedy for specific export price discrimination and subsidy practices recognized as unfair trading practices. The international agreements and national laws governing antidumping duties and countervailing duties thus are remedial and not punitive, as such duties are limited to offsetting only the amount of any unfair pricing or subsidies. They are not meant to punish a country simply for having an economy with a different structure.

For "market economy" countries, trade distorting governmental interventions in the market are treated as subsidies and remedied through the WTO Subsidies Code and the application of countervailing duties. Unfairly low export pricing, relative to home market pricing and production costs, is remedied through the WTO Antidumping Agreement and antidumping duties.

For "non-market economy" countries, on the other hand, the United States has determined that no direct

remedy for subsidies is permitted, and unfair pricing is measured with reference to the "factors of production" used to produce the investigated products, valued using available data in "surrogate" countries. This methodology aimed at avoiding "distortions" in pricing by producers in the NME country introduces its own pricing distortions. The surrogate country selected has its own market distortions and peculiarities, based on its structure and comparative advantages. Moreover, data limitations generally mean that surrogate prices for individual "factors of production" are not prices for identical products, and surrogate values used for general and administrative expenses and for profits do not reflect those of comparable enterprises operating in comparable circumstances.

The issue of whether an economy should be treated for antidumping and countervailing duty purposes as a market economy or as a non-market economy should take into account which methodology best addresses the conduct sought to be remedied by antidumping and countervailing duties. In this connection, China observes that governments worldwide are involved and intervene in their economies. Governments in countries the United States treats as market economies for antidumping purposes provide trade-distorting subsidies, control interest rates, own production and trading companies, control natural resources, intervene in foreign exchange markets and impose currency controls, regulate the conditions of competition, and even set prices for certain goods and services.

The question of whether a country "operates on market principles of cost and pricing." 19 U.S.C. § 1677(18)(B), therefore necessarily is a question of degree and not absolutes, aa the United States itself recognizes in its six-factor NME test Each factor specifies that the Department is to consider "the extent" of market-oriented activity, including government ownership, foreign investment, currency convertibility, etc.

China believes that, in assessing whether the Chinese economy is market-driven to the necessary "extent," the central questions with respect to alleged distortions should be not whether distortions exist, as distortions exist in all economies, but rather whether each alleged distortion (1) is of the type intended to be addressed by the Subsidies Code and Antidumping Agreement, and thus falling outside normal tariff obligations, and (2) is incapable of being addressed adequately through the normal, market economy measures of antidumping and countervailing duties. Unless the NME antidumping methodology is better suited to fairly remedying the alleged distortion, it is not appropriate to resort to surrogate values that are themselves distorted.

MARKET ECONOMY DEVELOPMENTS IN CHINA

China began its transition from a centrally planned economy under the leadership of the late Deng Xiaoping in 1978. In 1979, China started promoting in rural areas the household contracted responsibility systems with remuneration linked to output, and farming households were entitled to full autonomy in arranging their production. In 1984, China made a decision to reform its economic system toward a market economy. In October 1992, China made explicit that the objective of China's

economic reforms was to establish a market economy system. In 2002, China proclaimed to the world that China has established a preliminary system of market economy. Along with the systemic transition, China has made phenomenal progress in market liberalization and economic growth.

Developments have included the following:

- recognition and protection of private property rights
- restructuring, reorganization, and reduction of state-owned enterprises
- dominance of private sector and private control over means of production and pricing
- decrease of state control and administration over economic affairs
- opening of economy to foreign investment

In light of this background of continuing economic liberalization, we address briefly each of the six factors in the Department's NME analysis.

I. The extent to which the Chinese currency is convertible into the currency of other countries

The currency of the People's Republic of China ("China"), the Renminbi ("RMB"), is freely convertible for current account transactions. Since December 1, 1996, China has adopted Article VIII of the International Monetary Fund ("IMF") Articles of Agreement.[2] The obligations imposed by Article VIII include: (1) the

2. IMF Annual Report 1997, at 72, available at *http://www.imf.org/external/pubs/ft/ar/97/pdf/file06.pdf* (last accessed May 17, 2004).

avoidance of restrictions on current payments; (2) the avoidance of discriminatory currency practices; and (3) the convertibility of foreign-held balances.[3] By adopting these obligations, China has removed all restrictions on payments and transfers for current transactions, which plainly are the most relevant for international trade.

China has also taken concrete steps towards full convertibility of capital account transactions. In the last two years, China has permitted foreign investors to acquire financing from the domestic Chinese market, and has permitted foreign banks to issue RMB securities. China has also launched the qualified foreign institutional investors ("QFII") program to facilitate foreign capital flow. In accordance with provisions of the IMF Articles of Agreement, however, China maintains a few restrictions on the movement of capital to prevent malicious attacks by speculative international short-term capital and to help maintain regional financial stability. Many countries that the Department recognizes as market economy countries, such as Russia and many former Soviet republics, maintain the same kind of measures for similar concerns. Nonetheless, it is China's goal, and China has made steady progress, toward achieving full convertibility of capital accounts.

II. The extent to which wage rates in China are determined by free bargaining between labor and management

The Chinese Government bas enacted and enforces laws to protect core labor standards and collective bargaining. Workers, with support from trade unions, are

3. Available at *http://www.imf.org/external/pubs/ft/aa/index.htm* (last accessed May 17, 2004).

enforcing their rights and the Government has developed mechanisms to assist workers.

The Chinese Government bas confirmed its commitment to a free labor market through legislative activities. Laws and regulations have been promulgated to promote free mobility of the work force by reforming the residency registration system, and to advance the practice of collective bargaining through fair negotiation between labor and management. Trade unions have independent civil status under Chinese law and represent workers' interests before a variety of labor dispute settlement forums. The public and private sectors have overwhelmingly adopted the labor contract system. Other than establishing government-regulated minimum wage and social security requirements to protect workers, the Chinese Government leaves wage determination to labor management negotiations and the operation of market forces.

III. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in China

China not merely permits, but strongly encourages foreign direct investment. Over at least the past decade, China has attracted and continues to attract tremendous amounts of foreign investment and has handsomely rewarded foreign investors. 479,605 foreign-invested enterprises have been established in China since 1979.1n 2003, the number reached 41,081.

China prides itself on its open and favorable investment environment, based on the principle of national treatment for foreign investors. The Chinese legal framework bas been constantly improved to facilitate foreign investment

in its manifold forms, including wholly foreign-owned enterprises, China-foreign equity joint ventures, and China-foreign cooperative contractual enterprises. Foreign investors are free to establish joint ventures or other forms of investment to engage in commercial activities in a broad range of goods and services.

In keeping with its commitments for accession to the World Trade Organization ("WTO"), China has further broadened market access to foreign investment in areas including domestic and foreign trade, banking and insurance, and professional services.

IV. The extent of government ownership or control of the means of production

The Chinese Government has significantly decreased its ownership and control of the means of production. The government does not control the production of goods, except for a limited number of items of strategic importance or of particular importance to the public welfare.

The emergence of a substantial and vibrant private sector, including a large number of foreign-invested enterprises in many sectors of the economy, is further evidence that the government now maintains limited ownership or control over the means of production.

V. The extent of government control over the allocation of resources and over the price and output decisions of enterprises

For the vast majority of products and services, the market, not the government, decides the allocation of resources, and enterprises make their price and output

decisions based on market considerations. In accordance with its WTO accession protocol, however, the Chinese Government reserves the right of state trading or designated trading and of setting or issuing guidance on prices for a very limited number of products and services, which are either of strategic significance or of particular importance to the public welfare. It has consistently been the Chinese Government's policy to accelerate market reform and promote the growth of the private sector.

VI Such other factors as the administering authority considers appropriate

The world has witnessed the astounding transformation in China's economy, and China is now an important stakeholder in the global trading system. Its dramatic economic growth stems from the opening of its economy to private enterprise and market forces. Indeed, China is now the world's third largest importer, and the fourth largest exporter, conditions which resulted from the market-oriented developments and economic integration noted under each of the factors above.

For all of the foregoing reasons, the Chinese economy is operating on the basis of market principles to a sufficient extent that the domestic prices and costs of its enterprises can reasonably be used as a basis for calculating normal value within the meaning of the U.S. antidumping law. The Government of the People's Republic of China looks forward to discussions with the United Sates on the issue of revoking China's current NME status and recognizing China's market economy status for U.S. antidumping law purposes.

REPORT ON THE INVESTIGATION ON THE SHUTDOWN OF PRODUCTION OF WEISHENG PHARMACEUTICAL CO., LTD., DATED APRIL 19, 2006

On April 13, the two of us from Northeast Pharmaceutical Group Co., Ltd (NEPG) arrived in Shijazhuang for the investigation on the shutdown of production of Weisheng Pharmaceutical Co., Ltd (hereinafter referred to as Weisheng Pharmaceutical). Based on the information we collected, we made a report as follows:

We visited the vacuum pump room at 9:00 am on April 15. After that, we walked around the plant area before going to the conference toom to have a meeting for approximately half an hour. Weisheng Pharmaceutical's people gave us an indefinite answer about production technology and market information of VC, so the information we got could only be used as a reference.

1. The formation workshop of Weisheng Pharmaceutical's two VC production lines was out of operation at 8:00 am on April 15.

2. There were totally 18 air compressors including two 400m^3/min ones, four 200m^3/min ones, six 37m^3/min ones and six 6 m^3/min ones in Weisheng Pharmaceutical's air compressor room, but we only saw five 37m^3/min ones and three 6 m^3/min ones operating on site and the rest had gone out of operation. It was confirmed that Weisheng Pharmaceutical's fermentation workshop had been shut down, while the workshops of extraction, conversion and refining are still processing material, All workshops are expected to stop running on April 23.

3. They declined our request for taking a brief look at the operation sites, except for the plant area. When passing through the fermentation workshop, we saw the air filter assembly that had been dismantled, which further confirmed the stoppage of the fermentation process.

4. We were not allowed to visit the western part of the factory where series product and finished products warehouses are located. The project of the new production line of VC derivatives of Shijiazhuang Pharmaceutical. Weisheng Pharmaceutical Co., Ltd was launched in November 2005 and in four-floor building (an area of 2,000m^2 occupied), a multi-layer and diversified product structural system of VC Series has been established with 20 varieties of VC fine powder, VC-Na, VC calcium and VC particles. With a total investment of RMB110 million Yuan, the project has an annual designed productivity of 4,000 ton VC-Na and 3,000-ton VC particles (DC level). Together with existing production lines, Weisheng Pharmaceutical will have the annual throughput of derivatives products of 10,000 tons. The 100 mesh VC is generated by screening anf 200 mesh VC is generated by comminution using imported equipment. VC particles of C-90 and C-95 are produced as ordered by customers, and they were even sold at the price lower than cost because Weishen Pharmaceutical gives its top priority on expanding market shares and increasing customer base now.

5. the overall yield of VC is around 72% with refined recovery rate of less than 90%. Since VC products are packed with heat sealed double PVC plastic bags, it is less possible for them to become yellow

and agglomerated. At the time of our visit, Weisheng Pharmaceutical was just certified by CSCC, and people from Southwest Pharmaceutical Co., Ltd was visiting them, the COS registration was undergoing with documents sent to an agency and its QA inspectors were under the management by the member company, including their incomes.

6 The VC inventory is over 4,000 tons at the price of 2.8.

7. The business of Shijiazhuang Pharmaceutical Group does not look promising.

8. In the conversation, we got to know that the business of those four key companies under the control of China Pharmaceutical Group limited was not that promising. *Hebei Zhongnuo Pharmaceutical Co., Ltd* with the revenue of RMB 400 million Yuan sees sharply decreased profit margins due to the decline of price in their 7ACA key product. *Zhongnuo Pharmaceuticals Co., Ltd* with the revenue of RMB1.4 billon yuan faces the unfavorable situation of penicillin and preparation of regular medicine in sales and profits due to the decrease of prices and sales volumes. *Hebei Huarong Pharmaceutical Co., Ltd* with the revenue of RMB150 million Yuan has principle product of VB12 under the fierce competition. Weisheng Pharmaceuticals with revenue of RMB 1 billion Yuan has VC inventory exceeding 4,000 tons that are sold at the price that is close to the baseline of costs with poor profit margins.

The non-listed companies have been privatized (few stocks held by the Group), including *Ouyi Pharmaceutical Co., Ltd, Hebei Hongyuan*

Chemicals Company, Xiaowei Pharmaceutical Co., Ltd, Lerentang Pharmaceutical Co., Ltd, Hebei Yuanzheng Pharmaceutical Co., Ltd, Shijiazhuang No. 4 Pharmaceutical Co., Ltd and Hebei Union Pharmaceutical Co., Ltd. More than half of them are making fair profits, of which, *Lerentang* and *Hebei Yuanzheng* have made substantial profits.

In Particular, Shijiazhung Pharmaceutical Group attaches a great importance to marketing stategy for "Guoweikang" VC tablets. The Product is packaged is packaged attractively in different specifications and the large investment is made on marketing, as it is sold in most of drug stores and supermarkets, in front of which there is an eye-catching large advertisment. (The product in the specification of 100mg x 30 tablets is sold at the price of RMB 13 to 15 Yuan and the price varies with different packing.)

9. The information about North China Pharmaceutical Group and Wellcome Pharmaceutical Co., Ltd.

For North China Pharmaceutical Group, the biggest problem is financial strain and substantial losses. It has a plenty of finished products in stock with approximately 3,000 to 4,000 tons of VC mainly because of the sharp decrease of export volume from January to February. At the same time, the salaries of the sales people are based on a percentage of their sales volume, so they are discouraged with the decreased price. It is also troubled by environmental issues, according to the news that "North China Pharmaceutical Group included into the first group of 11 enterprises that handle environmental issues under the supervision of Provincial Environmental Protection Bureau" published on Yanzhao Evening

Paper on April 16. We also got to know that Wellcome's DC-level products were immediately improved in technology standard and quality since its shutdown and it's said that the joint venture project between Wellcome and DSM is in progress with a "work performance survey" being conducted lately, and the operation is progressing

In summary, in our conversation with them, we felt their sales people were under a high pressure and they were very much concerned about when NEPG's production was to be shut down. They strongly suggested, "We expect our company to stop operation in the second half of the year again under the planning of NEPG to prolong the production halt from 40 days to around 60 to 75 days in a year to really make a difference."

April 19, 2006

Import and Export Company

SELECTED EXHIBITS TO THE DECLARATION OF STEVEN R. NEWMARK IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF FOREIGN LAW AND ENTRY OF JUDGMENT PURSUANT TO RULE 44.1, FED. R. CIV. P., FILED NOVEMBER 23, 2009

STATEMENT IN *IN RE VITAMIN C ANTITRUST LITIGATION* OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, DATED AUGUST 31, 2009

MINISTRY OF COMMERCE OF THE
PEOPLE'S REPUBLIC OF CHINA
2, DONG CHANG'AN STREET, BEIJING,
CHINA 100731

Statement In *In Re Vitamin C Antitrust Litigation*, 06-MD-1738 (DGT)

August 31, 2009

Amicus The Ministry of Commerce of the People's Republic of China (the "Ministry") authorizes its Department of Treaty and Law to respectfully submit this Statement (together with an authorized English translation).

1. The Ministry has attached great importance to the antirust litigation in the United States brought against Chinese vitamin C exporters. The Ministry submitted to tills Court *the Brief of Amicus Curiae of the Ministry of Commerce of the People's Republic of China in support of the Defendants' Motion to Dismiss the Complaint* in

June 2006 and its *Statement In Re Vitamin C Antitrust Litigation* in June 2008. Taking notice of the comments and views made by Your Honor, the plaintiffs, plaintiffs' counsels and the experts, and the relevant documents, the Ministry would like to draw the Court's attention to the positions taken by the Ministry in the above-mentioned two documents, and would like to reiterate here that the alleged conduct by the defendant Chinese vitamin C exporters is the result of the defendants' performing their obligations to comply with Chinese laws, rather than conduct on their own initiative.

2. In order to prevent self-destructive competition through distorted pricing by Chinese exporters caught unprepared for the drastic change of China's export policies, and to mitigate potential exposures to antidumping investigations in other countries against Chinese exporters, the Ministry took active measures by exerting export regulation over certain commodities that might encounter or have encountered such problems. Although different regulatory measures may have been implemented in line with changes of circumstances at different times, enterprises in regulated industries were nevertheless compelled to comply with relevant rules and regulations, or they would otherwise be subject to penalties.

3. The actual specific measures taken by China to effect its regulatory policies include what is referred to as a "system of self-discipline". This system has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct.

In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.

4. Vitamin C falls into the category of products subject to the above-mentioned regulation. During the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume in compliance with China's relevant rules and regulations in order to maintain orderly export, safeguard the interests of the country as a whole and avoid self-destructive competition.

5. The Ministry authorized and instructed the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") and its Vitamin C Subcommittee to implement relevant policies related to the export of vitamin C products. Embodied in the Ministry's delegation of authority to the Chamber were industry regulatory functions and powers as well as necessary enforcement measures. Vitamin C exporters were thus subject to the regulation by the Chamber, including compliance with the Chamber's requirements of self-discipline, the very purpose of which was to coordinate each exporter's behavior. No vitamin C exporter could

ignore these policies, nor could they abstain from such coordination with regard to export price and production volume when asked to by the Chamber.

6. The self-disciplinary system of export coordination also includes meetings and discussions between and among the parties subject to the Chamber's direction and supervision, and reaching agreements among themselves on taking appropriate actions in the interest of the country as a whole. Participation in such discussions, taking a vote and conducting other similar activities to reach their final consensus constitutes an integral part of the self-discipline process. Vitamin C exporters must comply with the above procedures and the agreements reached in compliance with such procedures; otherwise, the Chamber would be required to exercise its power to penalize those who were in violation of such procedures and agreements.

7. The Ministry has read the report issued by plaintiffs' expert, Dr. Paula Stern. The Ministry believes that statements of representatives of the Ministry and other government agencies, with regard to China's market economy status, and remarks regarding Chinese companies setting price and production volume according to the principle of market demand, quoted by Dr. Stern were made in a different context -- one that had nothing to do with export price regulations -- and were *general descriptions* of the current status of China's market economy presented in a special context. These general descriptions are irrelevant to the present case and should not be deemed as explicit or implicit statements of China's abandonment of its limited regulatory policies over certain designated industries including the vitamin C industry,

or of China's waiver of its power to continue to regulate according to Chinese and international law. The Ministry believes that maintaining its regulation in a limited manner (such as its regulation over vitamin C export) is consistent with China's national goal of establishing a socialist market economy. As stated under Point 2 above, the adoption of government regulations over certain commodities (such as vitamin C) at a given stage in history serves the specific interests of China and is consistent with the trade policies of importing countries to protect and regulate relevant domestic industries. The regulations are implemented in a manner consistent with international law and custom and, during the process of implementation, have not been subject to challenge from the government of other countries or regions. China understands and believes that virtually all sovereign nations and regions (including the United States), proceeding from their own interests, have exercised various forms of government regulations over part of their private sector and certain industries. China's export regulations of vitamin C at issue in this case are no different.

Respectfully submitted,

Department of Treaty and Law

Minister of Commerce of the People's Republic of China

FOREIGN TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, EFFECTIVE JULY 1, 2004

Foreign Trade Law of The People's Republic of China (2004)

Thursday, July 01, 2004 Posted: 21:20 BJT (20 GMT)
MOFCOM

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Chapter 1 General Provisions

Article 1 This Law is formulated with a view to expanding the opening to the outside world, developing foreign trade, maintaining foreign trade order, protecting the legitimate rights and interests of foreign trade dealers

and promoting the sound development of the socialist market economy.

Article 2 This Law applies to foreign trade and the protection of trade-related aspects of intellectual property rights. For the purposes of this Law, "foreign trade" refers to import and export of goods and technologies and the international trade in services.

Article 3 The authority responsible for foreign trade under the State Council is in charge of the administration of the foreign trade of the entire country pursuant to this Law.

Article 4 The State shall pursue a uniform foreign trade regime, encourage the development of foreign trade and maintain fair and free foreign trade order.

Article 5 The people's Republic of China shall, on the principle of equality and mutual benefit, promote and develop trade relations with other countries and regions, enter into or participate in such regional economic trade agreements as customs union agreement, free trade agreement and participate in regional economic organizations.

Article 6 The People's Republic of China shall, in accordance with the international treaties and agreements to which it is a contracting party or a participating party grant the other contracting parties or participating parties, or on the principle of reciprocity grant the other party most-favored-nation treatment or national treatment in the field of foreign trade.

Article 7 In the event that any country or region applies prohibitive, restrictive or other like measures on a

discriminatory basis against the People's Republic of China in respect of trade, the People's Republic of China may, as the case may be, take counter-measures against the country or region in question.

Chapter 2 Foreign Trade Dealers

Article 8 For the purposes of this Law, "foreign trade dealers" refers to legal persons, other organizations or individuals that have fulfilled the industrial and commercial registration or other practicing procedures in accordance with laws and engage in foreign trade dealings in compliance with this Law and other relevant laws and administrative regulations.

Article 9 Foreign trade dealers engaged in import and export of goods or technologies shall register with the authority responsible for foreign trade under the State Council or its authorized ·bodies unless laws, regulations and the authority responsible for foreign trade under the State Council do not so require. The specific measures for registration shall be laid down by the authority responsible for foreign trade under the State Council. Where foreign trade dealers fail to register as required, the Customs authority shall not process the procedures of declaration, examination and release for the imported and exported goods.

Article 10 The international trade in services shall be carried out in compliance with the provisions of this Law and either relevant laws and administrative regulations. The units engaged in foreign contract of construction project or foreign labor cooperation shall be equipped with corresponding eligibility or qualification. The specific

measures therefore shall be laid down by the State Council.

Article 11 The State may implement state trading on certain goods. The import and export of the goods subject to state trading shall be operated only by the authorized enterprises unless the state allows the import and export of certain quantities of the goods subject to state trading to be operated by the enterprises without authorization. The lists of the goods subject to state trading and the authorized enterprises shall be determined, adjusted and made public by the authority responsible for foreign trade under the State Council in conjunction with other relevant authorities under the State Council. In the event of importation of the goods subject to state trading without authorization in violation of paragraph 1 of this Article, the Customs shall not grant rele[illegible]

Article 12 Foreign trade dealers may accept the authorization of others and conduct foreign trade as an agent within its scope of business.

Article 13 Foreign trade dealers shall, in accordance with the regulations laid down by the authority responsible for foreign trade under the State Council or other relevant authorities under the State Council in accordance with law, submit the documents and materials relevant to their foreign trade dealings to relevant authorities. The authorities concerned shall keep business secrets confidential for the providers thereof.

Chapter 3 Import and Export of Goods and Technologies

Article 14 The State permit free import and export of goods and technologies unless the laws or administrative regulations provide otherwise.

Article 15 The authority responsible for foreign trade under the State Council may, in accordance with the need to supervise import and export, implement automatic import and export licensing certain goods subject to free import and export and make public the list thereof. Where the consignee or the consigner of the imported or exported goods subject to automatic licensing submits the automatic licensing application before going through the Customs declaration procedures, the authority responsible for foreign trade under the State Council or its authorized authorities shall grant approval. In case of failure to accomplish automatic licensing procedures, the Customs shall not grant release. In the case of importing or exporting technologies subject to free import and export, the contracts thereof shall be registered with the authority responsible for foreign trade under the State Council or its authorized authorities.

Article 16 The State may restrict or prohibit the import or export of relevant goods and technologies for the following reasons that:

(1) the import or export needs to be restricted or prohibited in order to safeguard the state security, public interests or public morals,

(2) the import or export needs to be restricted or prohibited in order to protect the human health or security, the animals and plants life or health or the environment,

(3) the import or export needs to be restricted or prohibited in order to implement the measures relating to the importations and exportations of gold or silver,

(4) the export needs to be restricted or prohibited in the case of domestic shortage in supply or the effective protection of exhaustible natural resources,

(5) the export needs to be restricted in the case of the limited market capacity of the importing country or region,

(6) the export needs to be restricted in the case of the occurrence of serious confusion in the export operation order,

(7) the import needs to be restricted in order to establish or accelerate the establishment of a particular domestic industry,

(8) the restriction on the import of agricultural, animal husbandry or fishery products in any form is necessary,

(9) the import needs to be restricted in order to maintain the State's international financial status and the balance of international payment,

(10) the import or export needs to be restricted or prohibited as laws and administrative regulations so provide, or

(11) the import or export needs to be restricted or prohibited as the international treaties or agreements to which the state is a contracting party or a participating party so require.

Article 17 The State may, in the case of the import or export of the goods and technologies relating to fissionable and fissionable materials or the materials form which they are derived as well as the import or export relating to arms, ammunition and implements for war, take any measures as necessary to safeguard the state security. The State may, in the time of war or for the protection

of international peace and security, take any measures as necessary in respect of import or export of goods and technologies.

Article 18 The authority responsible for foreign trade under the State Council in conjunction with other relevant authorities under the State Council shall, in accordance with the provisions of Articles 16 and 17 in this Law, establish, adjust and publish the list of goods and technologies of which the import or export is subject to restrictions or prohibitions. The authority responsible for foreign trade under the State Council independently or in conjunction with other relevant authorities under the State Council may, with the approval from the State Council, decide, on a temporary basis, to impose restrictions or prohibitions on the import or export of goods and technologies not included in the list provided in the above paragraph within the meaning of Article 16 and Article 17 in this Law.

Article 19 Goods subject to import or export restriction shall be subject to quota and/or licensing control; technologies whose import or export is restricted shall be subject to licensing control. Import or export of any goods and technologies subject to quota and/or licensing control will be effected only with the approval of the authorities responsible for foreign trade under the State Council or the joint approval of the foregoing authorities and other relevant authorities under the State Council in compliance with the provisions of the State Council. Certain imported goods may be subject to tariff rate quota control.

Article 20 Quotas and tariff rate quotas of the imported and exported goods shall be distributed on the principles

of transparency, equity, impartiality and efficiency by the authority responsible for foreign trade under the State Council or the relevant authorities under the State Council within their respective responsibilities. Specific measures for the distribution shall be laid down by the State Council.

Article 21 The state shall implement the commodity assessment system in a uniform manner and in accordance with the provisions of relevant laws and administrative regulations carry out certification, inspection or quarantine in respect of imported and exported commodities.

Article 22 The state shall implement origin management in respect of the imported and exported goods. Specific measures therefore shall be laid down by the State Council.

Article 23 Where the import or export of cultural relics, wildlife animals, plants and the products thereof are prohibited or restricted by other laws or administrative regulations, the provisions of relevant laws and regulations shall be observed.

Chapter 4 International Trade in Services

Article 24 In respect of international trade in services, the People's Republic of China shall, in accordance with the commitments made in international treaties or agreements to which the People's Republic of China is a contracting party or a participating party, grant the other contracting parties or participating parties market access and national treatment.

Article 25 The authority responsible for foreign trade under the State Council in conjunction with other relevant authorities under the State Council shall, pursuant to provisions of this Law and other laws and administrative regulations, administer the international trade in services.

Article 26 The State may impose restrictions and prohibitions on the international trade in services for the reasons that:

(1) restrictions or prohibitions are needed to safeguard the state security, public interests or public morals,

(2) restrictions or prohibitions are needed to protect the human health or security, the animals and plants life or health or the environment,

(3) restrictions are needed to establish or accelerate the establishment of a particular domestic service industry,

(4) restrictions are needed to maintain the balance of international payment of the state,

(5) restrictions or prohibitions are needed as laws and administrative regulations so provide, or

(6) restrictions or prohibitions are needed as the international treaties or agreements to which the state is a contracting party or a participating party so require.

Article 27 The State may, in the case of military-related international trade in services, as well as the international trade in services relating to fissionable and fissionable materials or the materials form which they are derived, take any measures as necessary to safeguard the state security. The state may, in the time of war or for the

protection of international peace and security, take any measures as necessary in respect of international trade in services.

Article 28 The authority responsible for foreign trade under the State Council in conjunction with other relevant authorities under the State Council shall, in accordance with the provisions of Articles 26 and 27 in this Law and other relevant laws and administrative regulations, determine, adjust and publish the market access list of international trade in services.

Chapter 5 Protection of Trade-Related Aspects of Intellectual Property Rights

Article 29 The State shall, in accordance with laws and administrative regulations relevant to intellectual property rights, protect trade-related aspects of intellectual property rights. Where the imported goods infringe intellectual property rights and impair foreign trade order, the authority responsible for foreign trade under the State Council may take such measures as prohibiting the import of the relevant goods from being produced or sold by the infringe within a certain period.

Article 30 Where the intellectual property right owner is involved in any one of such practices as preventing the lincesee form challenging the validity of the intellectual property right in the licensing contract, conducting coercive package licensing or incorporating exclusive grantback conditions in the licensing contract, which impairs the fair competition order of foreign trade, the authority responsible for foreign trade under the State Council may take measures as necessary to eliminate such impairment.

Article 31 If other countries or regions do not grant the legal persons, other organizations and individual from the People's Republic of China national treatment in respect of the protection of intellectual property rights, or cannot provide adequate and effective protection of intellectual property rights for the goods, technologies or services from the People's Republic of China, the authority responsible for foreign trade under the State Council may, in accordance with the provisions of this Law and other relevant laws and administrative regulations and the international treaties or agreements to which the People's Republic of China is a contracting party or a participating party, take measures as necessary in respect of the trade with the country or region in question.

Chapter 6 Foreign Trade Order

Article 32 In foreign trade dealings, monopolistic behavior in violation of relevant provisions of anti-monopoly laws and administrative regulations is not allowed. In foreign trade dealings, any monopolistic behavior with the effect of eliminating market fair competition shall be disposed of in accordance with relevant provisions of anti-monopoly laws and administrative regulations. Where any activities in violation of laws set forth in the former paragraph occur with the effect of impairing foreign trade order, the authority responsible for foreign trade under the State Council may take measures as necessary to eliminate the impairment.

Article 33 In foreign trade activities, such unfair competition activities as selling the products at unreasonable low prices, colluding with each other in a

tender, producing and releasing false advertisements and conducting commercial bribery and others like are not allowed. Any unfair competitive practice conducted in the foreign trade activities shall be disposed of in accordance with relevant laws and administrative regulations against unfair competition. Where any illegal activities as provided in the previous paragraph occur with the effect of impairing foreign trade order, the authority responsible for foreign trade under the State Council may take such measures as prohibiting the dealer from importing and exporting relevant goods and technologies to eliminate the impairment.

Article 34 The following practices are not allowed in foreign trade activities:

(1) forgery, distortion of origin marks of the imported and exported goods; forgery, distortion or trading of origin certificates of imported or exported goods, import and export licenses, certificates of import and export quota or any other certificate for import and export;

(2) defrauding the State of the refunded tax on exports;

(3) smuggling;

(4) evading certification, inspection and quarantine inspection as provided by laws and administrative regulations;

(5) other activities in violation of the provisions of laws and administrative regulations.

Article 35 In foreign trade activities, foreign trade dealers shall act in compliance with relevant provisions of foreign exchange administration of the state.

Article 36 The authority responsible for foreign trade under the State Council may give a notice to the public the activities in violation of this Law for impairing foreign trade order.

Chapter 7 Foreign Trade Investigation

Article 37 In order to maintain the foreign trade order, the authority responsible for foreign trade under the State Council may carry out investigations on the following matters in accordance with laws and administrative regulations at its disposal or in conjunction with other relevant administrations:

(1) the impact on the domestic industry as well as the competitive strengths of import and export of goods, import and export of technologies and international trade in services;

(2) trade barriers of relevant countries or regions;

(3) matters needed to be investigated on in order to determine whether such foreign trade remedies as anti-dumping, countervailing or safeguard measures shall be taken;

(4) activities that circumvent foreign trade remedies;

(5) matters in relation to state security in foreign trade;

(6) matters needed to be investigated on in order to enforce the provisions of Articles 7, 29(2), 30, 31, 32(3) and 33(3).

(7) Other matters which may have impact on foreign trade order and need to be investigated on.

Article 38 The authority responsible for foreign trade shall give a notice in case of initiating foreign trade

investigations. The investigation may take the form of questionnaires in writing, hearings, on-the-spot investigations, entrusted investigations and otherwise. The authority responsible for foreign trade under the State Council shall, on the basis of the findings, submit investigation reports or make determinations and give public notices.

Article 39 Relevant units and individuals shall provide the foreign trade investigation with cooperation and assistance. The authority in charge of foreign trade and other authorities under the State Council as well as their staff members shall have the obligation to keep the state secrets and business secrets known to them confidential during foreign trade investigations.

Chapter 8 Foreign Trade Remedies

Article 40 The State may take appropriate foreign trade remedies on the basis of the findings of foreign trade investigation.

Article 41 Where a product from other countries or regions is dumped into the domestic market at a price less than its normal value and under such conditions as to cause or threaten to cause material injury to the established domestic industries, or materially retards the establishment of domestic industries, the State may take anti-dumping measures to eliminate or mitigate such injury, threat of injury or retardation.

Article 42 Where the export of a product from other countries or regions to the market of a third country causes or threatens to cause material injury to the established domestic industries, or materially retards

the establishment of domestic industries, the authority responsible for foreign trade under the State Council may, on the request of the domestic industries, carry out consultations with the government of that third country and require it to take appropriate measures.

Article 43 Where an imported product has directly or indirectly accepts any specific subsidiary granted by the exporting country or region and under such conditions as to cause or threaten to cause material injury to the established domestic industries, or materially retards the establishment of related domestic industries, the State may take countervailing measures to eliminate or mitigate such injury or threat of injury or retardation.

Article 44 Where a product is being imported in substantially increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products, the State may take safeguard measures as necessary to eliminate or mitigate such injury or threat of injury and provide the industry concerned with necessary support.

Article 45 Where the increase of services provided to China by the service suppliers from other countries or regions causes or threatens to cause injury to the domestic industries that provide like or directly competitive services, the State may take remedies as necessary to eliminate or mitigate such injury or threat of injury and provide such industry with necessary support.

Article 46 Where the restriction imposed by a third country on the import of a certain product causes the increase in

quantities of such product imported into the domestic market and under such conditions as to cause or threaten to cause injury to the established domestic industry, or materially retards the establishment of related domestic Industries, the state may take remedies as necessary to restrict the import of the product concerned.

Article 4 7 Where any country or region that enters into or participate in the economic and trade treaties or agreements with the People's Republic of China deprives the People's Republic of China of or impairs her interests under such treaties or agreements, or hinders realization of the object of such treaties or agreements, the People's Republic of China has the right to request the relevant country or region to take appropriate remedies and has the right to suspend or terminate its performance of relevant obligations in compliance with relevant treaties and agreements.

Article 48 The authority responsible for foreign trade under the State Council shall carry out bilateral or multilateral foreign trade consultations, negotiations and settle disputes in accordance with this Law and other relevant laws.

Article 49 The authority responsible for foreign trade under the State Council and the other relevant authorities under the State Council shall establish the pre-warning and emergency system for import and export of goods, import and export of technologies and international trade in services so as to cope with the unexpected and unusual situations in foreign trade for the purpose of safeguarding the economic Security of the State.

Article 50 The State may take necessary anti-circumvention measures against the activities circumventing the foreign trade remedies provided under this Law.

Chapter 9 Foreign Trade Promotion

Article 51 The State formulates foreign trade expansion strategies, establishes and improves the foreign trade promotion mechanism.

Article 52 The State shall establish and improve financial institutions for foreign trade and establish funds for foreign trade development and risk as the development of foreign trade requires.

Article 53 The State may take such measures as import and export credit, export credit insurance, export tax refund and other foreign trade promotion measures for the purpose of developing foreign trade.

Article 54 The State establishes the foreign trade public information service system, providing foreign trade dealers and the public with information services.

Article 55 The State shall take measures to encourage foreign trade dealer to explore international market, and develop foreign trade by adopting various forms such as foreign investment, foreign contract of construction project and foreign labor cooperation.

Article 56 Foreign trade dealers may organize or participate in relevant associations or chambers of commerce for importers and exporters in accordance with the law. Relevant associations or chambers of commerce shall abide by relevant laws and, regulations, provide in compliance with their articles of association their members with foreign trade related services in aspects

of manufacturing, marketing, information and training, play a positive role in coordination and self-discipline, submit applications for relevant foreign trade remedies, safeguard the interests of their members and the industry, report to the relevant authorities the suggestions of their members with respect to foreign trade promotion, and actively promote foreign trade.

Article 57 The organization for the promotion of international trade in China shall, in accordance with its articles of association, engage in developing foreign trade relations, sponsoring exhibitions, providing information and advisory services and carry out other foreign trade promotion activities.

Article 58 The State shall support and facilitate the foreign trade carried out by small and medium-sized enterprises with small or middle scale.

Article 59 The State shall support and promote the development of foreign trade in national autonomous areas and economically under-developed areas.

Chapter 10 Legal Liabilities

Article 60 Anyone who imports or exports the goods subject to the state trading without authorization in violation of Article 11 of this Law may be imposed on a fine of not more than RMB 50,000 Yuan by the authority responsible for foreign trade under the State Council or other authorities under the State Council; if the circumstances are serious, the aforesaid authorities may refuse to accept the application submitted by the trade dealer in violation of laws for carrying out imports or

exports of the goods subject to state trading within three years from the date the administrative sanction decision takes effect or may withdraw the granted authorization of import and export of goods subject to state trading.

Article 61 Anyone who imports and exports the goods of which import and export is prohibited, or imports and exports the goods of which import and export is restricted without authorization shall be disposed of and punished by the Customs in accordance with relevant laws and administrative regulations; if the case constitutes a crime, he shall be prosecuted for criminal liabilities in accordance with the law. Anyone who imports and exports the technologies of which import and export is prohibited, or imports and exports the technologies of which import and export is restricted without authorization shall be disposed of and punished in accordance with relevant laws and regulations; Where no laws or regulations are available to apply to such activities, the authority responsible for foreign trade under the State Council shall order him to make a rectification, confiscate the illegal proceeds and impose a fine from one to five times the amount of the illegal gains. If there are no illegal proceeds or the illegal proceeds are less than RMB 10,000 Yuan, a fine from RMB, 10,000 Yuan to RMB 50,000 Yuan shall be imposed; if the case constitutes a crime, he shall be prosecuted for criminal liabilities in accordance with the law. The authority responsible for foreign trade under the State Council and other relevant authorities under the State Council may, from the date when the administrative sanction decision or criminal penalty judgment takes effect as provided in paragraphs 1 and 2 of this Article,

refuse the applications for import and export quotas or licenses submitted by the law-breaker, or prohibit the law-breaker from engaging in the import and export of relevant goods and technologies within a period from one to three years.

Article 62 Anyone who engages in the international trade in services subject to prohibition or engages in international trade in services subject to restriction without authorization shall be disposed of and punished in accordance relevant laws and administrative regulations; Where no laws or regulations are available to apply to such activities, the authority responsible for foreign trade under the State Council shall order him to make a rectification, confiscate the illegal gains and impose a fine from one to five times the amount of the illegal proceeds. If there are no illegal proceeds or the illegal proceeds are less than RMB 10,000 Yuan, a fine from RMB 10,000 Yuan to RMB 50,000 Yuan shall be imposed; if the case constitutes a crime, he shall be prosecuted for criminal liabilities in accordance with the law. The authority responsible for foreign trade under the State Council may, from the date when the administrative sanction decision or criminal penalty judgment takes effect as provided in the previous paragraph of this Article, prohibit the law-breaker from engaging in relevant international trade in services within a period from one to three years.

Article 63 Anyone who acts in violation of the provision of Article 34 of this Law shall be punished in accordance with relevant laws and administrative regulations; if the case constitutes a crime, he shall be prosecuted for criminal liabilities in accordance with the law. The authority responsible for foreign trade under the State Council may,

from the date when the administrative sanction decision or criminal penalty judgment takes effect as provided in the previous paragraph of this Article, prohibit the law-breaker from engaging in relevant foreign trade activities within a period from one to three years.

Article 64 Where a foreign trade dealer is prohibited from engaging in the relevant foreign trade activities in accordance with Articles 61-63, within the period of prohibition the Customs authority shall not grant release to the relevant imported or exported goods of that foreign trade dealer in accordance with the decision made by the authority responsible for foreign trade under the State Council, and the foreign exchange administration or designated foreign exchange banks shall not process the procedures of selling and purchasing foreign exchange.

Article 65 Any staff member serving in the authority responsible for foreign trade in accordance with this Law who neglects his duty, engages in malpractices for personal gains or abuses his power, shall be prosecuted for criminal liabilities if the case constitutes a crime, or shall be subject to administrative sanctions if the case dose not constitute a crime in accordance with the law. Any staff member serving in the authority responsible for foreign trade in accordance with this Law, who extorts property from others with job convenience, or illegally accepts others' property and seeks advantages for them in return shall be prosecuted for criminal liabilities if the case constitutes a crime, or shall be subject to administrative sanctions if the case does not constitute a crime in accordance with the law.

Article 66 The parties in the foreign trade activities may apply for an administrative reconsideration or bring an administrative lawsuit before a people's court in case of dissatisfaction with a specific administrative act by the authority responsible for foreign trade administration in accordance with this Law.

Chapter 11 Supplementary Provisions

Article 67 Where other laws or administrative regulations provide otherwise in respect of foreign trade administration of military supplies, fissionable and fissionable materials or the materials form which they are derived and import and export administration of cultural products, the provisions thereof shall be observed.

Article 68 The State applies flexible measures, provides preferential conditions and conveniences to the trade between the towns on the frontier and those towns of neighboring countries on frontier as well as trade among border residents. Specific measures therefore shall be laid down by the State Council.

Article 69 This Law shall not apply to the separate customs territories of the People's Republic of China.

Article 70 This Law shall come into force as of July 1, 2004.

(All information published in this website is authentic in Chinese. English is provided for reference only.)

Announcement Measures on Behavior Prohibited by Laws and Regulations of Foreign Trade Operator

Thursday, September 15, 2005 Posted: 09:35 BJT (0135 GMT) CAITEC

Article 1, Announcement Measures is formulated in accordance with Foreign Trade Law of PRC (hereinafter referred to as Foreign Trade Law) and other related laws and regulations, so that the impartial and free foreign trade orders could be maintained.

Article 2, Announcement Measures is established for the foreign trade operators and their behaviors, in foreign trade or relevant intelligence property protection, which violate related laws and regulations, imperil foreign trade orders and act against Foreign Trade Law.

Article 3, The foreign trade operator mentioned in Announcement Measures indicates the juridical person, other organization or individual dealing with foreign trade activities, with legal business registration or other working license and acting in accordance with Foreign Trade Law and related administrative regulations.

Article 4, Ministry of Commerce is in charge of the communication, correspondence and collection of the information on operators and behavior prohibited by laws and regulations, which shall be proclaimed to the public through official website and appointed nationwide publications. Ministry of Commerce and local responsible commercial sectors shall establish information exchange and correspondence mechanism together with sectors concerned customs, taxation, quality inspection and

quarantine, foreign exchange management, public security and court.

Article 5, The foreign trade operators and their behaviors prohibited by laws and regulations indicate the following behavior happened in the foreign trade activities, which has been dealt with, punished or charged with criminal responsibility in accordance with relevant laws and administrative regulations.

1. Activity that concern importing and exporting prohibited commodities or technology, or importing and exporting limited commodities or technology without permission.

2. Activity that concern violation of state-run trade administrative regulation by presumptuously importing and exporting commodity that under state-run trade administration without authorization.

3. Activity that concern prohibited international service trade or engage limited international service trade without permission.

4. Activity that violate intelligence property law and compromise foreign trade order.

5. Activity that concern monopolization and behave against anti-monopolization law and regulations.

6. Activity that concern illegitimate competition by conducting improper low-price sale, bid collusion, false advertisement or business bribery.

7. Activity that concern forging and falsifying the mark of place of origin, forging, falsifying and tra...

the mark of place of origin, import and export license, import and export quota certificate or other certification document of imported and exported commodity.

8. Activity that concern export rebate cheating.

9. Smuggle.

10. Shirking laws, authentication, inspection and quarantine set by administrative regulation.

11. Activity that concern violation of related foreign administrative regulation.

12. Other activity that concern violation of laws and administrative regulations, or compromise foreign trade order.

Article 6, Information announcement of behavior prohibited by laws and regulations include:

1. Title, organization code, habitation, business location, artificial person and enrollment number of trade registration of the operator.

2. Behavior that violate law and regulations.

3. Content of transaction, punishment, and criminal responsibility according to law and administrative regulations.

Article 7, If the foreign trade operator that has been punished or charged with criminal responsibility fall into the following situations, the announcement could be cancelled or delayed.

1. Administrative reconsideration or lawsuit on administrative punishment is raised in the valid duration

set by law, but no final arbitration or decision has been made.

2. Concerning information that can not be revealed, such as national security, business privacy, etc.

Article 8, Ministry of Commerce shall announce behavior and operator that compromise foreign trade orders based on principles of impartiality and justice.

Article 9, Staff in charge of announcement shall bear responsibility in case dereliction of duty happens and result in negative effects.

Article 10, Ministry of Commerce reserves the right to explain this Announcement Measures.

Article 11, Announcement Measures on Behavior Prohibited by Laws and Regulations of Foreign Trade Operator shall take effect as of September 1, 2005.

(All information published in this website is authentic in Chinese. English is provided for reference only.)

SELECTED EXHIBITS TO THE DECLARATION OF JENNIFER MILICI IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF FOREIGN LAW AND ENTRY OF JUDGMENT, FILED NOVEMBER 23, 2009

EXCERPTED PORTION OF THE TRANSCRIPT OF THE DEPOSITION OF WANG RENZHI OF NORTHEAST PHARMACEUTICAL CO. LTD., FILED JULY 17, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL NO. 1738

IN RE:

VITAMIN C ANTITRUST LITIGATION

Thursday, July 17, 2008

9:05 a.m.

Videotaped Deposition of WANG RENZHI, held at the offices of Greenberg Traurig, LLP, MetLife Building, 200 Park Avenue, New York, New York 10166, pursuant to Notice, before Otis Davis, a Notary Public of the State of New York.

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[72]Q. The minimum export price in 2005 was $3.35 per kilogram for Vitamin C, correct?

A. Right.

Q. And Exhibit 161 indicates that companies were selling Vitamin C for $2.80 to $2.90, correct?

[73]MR. LAPATINE: Are you asking him if that's what the document says, or if that's what happened?

MR. AGRAWAL: No, I'm asking.

MR. LAPATINE: Because you referenced the document.

Q. Do you have any reason to contest the accuracy of what is indicated Exhibit 161, companies were selling Vitamin C at $2.80 to $2.90?

A. This was the actual market price of Vitamin C in the second half of 2005.

Q. Was NEPG and the other three major manufacturers of Vitamin C in China selling at that market price in the second half of 2005?

A. The majority of them, yes.

Q. Was NEPG ever penalized for selling Vitamin C below the $3.35 minimum export price?

A. This is exactly what the Chamber of Commerce -- this is a problem that it had to resolve. It was a [74] special -- very abnormal situation, a very special situation, extraordinary situation.

So the Chamber of Commerce was trying by all kinds of means to change the situation. This price on the international market at the time was conducive to counter antidumping, but the Vitamin C manufacturers, they each have a big inventory. In order to survive, they have to sell part of it. The Chamber of Commerce understood that. That's why it took a flexible attitude in handling such.

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EXCERPTED PORTION OF THE TRANSCRIPT OF THE DEPOSITION OF WANG QI OF JIANGSU JIANGSHAN PHARMACEUTICAL CO., JULY 2, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MDL NO. 1738

IN RE:

VITAMIN C ANTITRUST LITIGATION.

July 2, 2008
10:07 a.m.

Videotaped Deposition of WANG QI, taken by Plaintiffs, pursuant to Notice, at the offices of Heller Ehrman LLP, Seven Times Square, New York, New York, before ERIC J. FINZ, a Shorthand Reporter and Notary Public within and for the State of New York.

***

[265]Q. Underneath the chart you have an analysis and two items there. And in the second item you report that the export price at its lowest level was $2.50 to $2.60 per kilogram; is that right?

A. Yes, that's what's written here.

Q. So during 2006, there was a period in which the Chinese manufacturers were charging their customers much less than $3.35 per kilogram; is that right?

THE INTERPRETER: $3.35?

[266]MR. ISAACSON: Right.

A. I should say that -- I should say that there was such a period in time in which the market price was lower than the floor price.

Q. And did you accomplish that by paying customers refunds or commissions?

A. Yes, I think in a number -- a handful of cases that that happened.

Q. Well, it happened enough to bring the market price down from $3.35 to at least $2.60 per kilogram; isn't that right?

MR. GOLDSTEIN: Object to the form.

A. I don't understand this question. Can you repeat?

MR. ISAACSON: I'll just move forward.

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REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA ON THE ADMINISTRATION OF THE IMPORT AND EXPORT OF GOODS, EFFECTIVE JANUARY 1, 2002

Decree of the State Council of the People's Republic of China

No. 332

The Regulations of the People's Republic of China on the Administration of the Import and Export of Goods has been passed at the forty-sixth executive meeting of the State Council on October 31, 200 I and is hereby promulgated for implementation as of January 1, 2002.

Premier of the State Council: Zhu Rongji

December 10, 2001

Regulations of the People's Republic of China on the Administration of the Import and Export of Goods

Chapter I General Provisions

Article 1 The present regulations have been enacted according to the relevant provisions of the Foreign Trade Law of the People's Republic of China (hereinafter referred to as the "Foreign Trade Law") for the purpose of standardizing the administration of the import and export of goods, maintaining the order of import and export of goods and promoting the healthy development of foreign trade.

Article 2 The present regulations shall be observed in regards to the importation of goods within the customs boundary of the People's Republic of China or the exportation of goods beyond the customs boundary of the People's Republic of China.

Article 3 The State exercises uniform administration over the import and export of goods.

Article 4 The State allows the free importation and exportation of goods and maintains the fairness and orderliness of the import and export of goods according to the law. Unless it is clearly provided in laws or administrative regulations to forbid or restrict the import or export of goods, no entity or individual may establish or maintain prohibitive or restrictive measures over the import or export of goods.

Article 5 The People's Republic of China, in terms of the import and export of goods, grants the most-favored nation treatment or national treatment to other contracting parties or member states to the international treaties or pacts that it has concluded or acceded to, or grants the most-favored-nation treatment or national treatment to its counterparts according to the principle of mutual benefit and reciprocity.

Article 6 Any country or region that takes prohibitive or restrictive measures of a discriminative nature or other similar measures against the People's Republic of China in terms of the import or export of goods, it may, according to the specific situations, take corresponding measures against such country or region.

Article 7 The department of the State Council in charge of foreign trade and economic cooperation (hereinafter referred to as the foreign trade department of the State Council) takes charge of the import and export of goods within the whole country according to the provisions of the Foreign Trade Law and the present Regulations.

The relevant departments of the State Council shall, on the basis of the functions and duties as determined by the State Council, be responsible for the administration of the import and export of goods according to the provisions of the present Regulations.

Chapter II Administration of Import of Goods

Section I Goods Prohibited from Importation

Article 8 In any of the circumstances as provided in Article 17 of the Foreign Trade Law, the goods concerned shall be prohibited from importation. If there are relevant provisions in other laws or regulations on prohibiting the importation of goods, such provisions shall be abided by.

The list of goods prohibited from importation shall be formulated, adjusted and promulgated by the foreign trade department of the State Council in collaboration with other relevant departments of the State Council.

Article 9 No goods that are prohibited from importation may be imported.

Section II Goods Restricted in Importation

Article 10 In any of the circumstances as provided in Clauses 1, 4, 5, 6, and 7 of Article 16 of the Foreign Trade Law, the goods concerned shall be restricted in importation. Where there are provisions in other laws or regulations on limiting the importation of goods, such provisions shall be abided by.

The list of goods restricted in importation shall be formulated, adjusted and promulgated by the foreign trade department of the State Council in collaboration with other relevant departments of the State Council.

The list of goods restricted in importation shall be promulgated at least 21 days prior to the implementation thereof; where the circumstances are urgent, it shall be promulgated at no later than the day of implementation.

Article 11 Where there are quantitative limits set by the state on the goods restricted in importation, the goods shall be subject to the administration of quotas, and other goods restricted in importation shall be subject to the administration of licenses.

When importing the goods subject to the administration of tariff quotas, the provisions of Section IV of this Chapter shall be followed.

Article 12 The goods restricted in importation that are under the administration of quotas shall be subject to the administration of the foreign trade department of the State Council and the relevant economic administrative departments of the State Council (hereinafter collectively referred to as administrative depatments of import quotas) on the basis of the functions and duties of these departments as provided by the State Council.

Article 13 For the goods restricted in importation that are under the administration of quotas, the administrative departments of import quotas shall promulgate the total amount of import quotas for the next year at no later than July 31 of each year.

An applicant of quotas shall apply to the administrative departments of import quotas for the next year between August 1 and 31 of each year.

The administrative departments of import quotas shall allocate the quotas for the next year to the quota applicants before October 31 of each year.

The administrative departments of import quotas may, where it is necessary, make adjustments to the total amount of the year and promulgate it at 21 days prior to its implementation.

Article 14 The quotas may be allocated according to the principle of uniform handling of all applications.

Article 15 Where the quotas are allocated according to the principle of uniform handling of all applications, the administrative departments of import quotas shall decide whether to grant quotas or not within 60 days after the prescribed deadline for filing applications.

Article 16 When allocating quotas, the administrative departments of import quotas shall take the following factors into consideration:

1. The performances of the applicant in import;

2. Whether the quotas in the past have been fully used;

3. The production capacity, operational scale and the sales situation of the applicant;

4. The applications filed by new import business operators;

5. The quantity of quotas applied; and

6. Other factors that need to be considered.

Article 17 An import business operator shall present the quotas certificate issued by the administrative departments of import quotas to the customs offices for handling the formalities of customs declaration and examination. The relevant economic administrative departments of the State Council shall report such information as the total amount of quotas of the year, the

plans of allocation, the issuance of quota certificates etc. to the foreign trade department of the State Council for archivist purposes.

Article 18 A holder of quotas who has not used up its quotas for the year shall return the unused quotas to the administrative departments of import quotas prior to September 1 of the same year. In case one fails to return the unused quotas and fails to use them up by the end of the year, the administrative departments of import quotas may make corresponding deductions to the quotas of the holder for the next year.

Article 19 For the goods restricted in importation that are subject to the administration of licenses, the import business operators shall file applications to the foreign trade department of the State Council or relevant departments of the State Council (hereinafter collectively referred to as the administrative departments of import licenses). The administrative departments of import licenses shall decide whether to grant a license or not within 30 days of receiving the application.

The import business operators shall present the import license issued by the administrative departments of import quotas to the customs office for handling the formalities of customs declaration and examination.

The term "import license" as mentioned in the preceding paragraph shall refer to the various kinds of certificates and documents that are of import nature as stipulated in laws and administrative regulations.

Article 20 The administrative departments of import quotas and the administrative departments of export licenses shall, on the basis of the provisions of the present

Regulations, formulate specific administrative measures so as to clarify the qualifications of the applicant, the departments for accepting applications, the principles and procedures of reviewing applications etc. and shall promulgate the measures prior to their implementation.

The department for accepting applications shall, as a general rule, be one department.

The documents requested by the administrative departments of import quotas and the administrative departments of import licenses for submission shall be limited to those documents and materials that are necessary for effecting the administration and the departments may not refuse to accept the applications under the pretext of trifle, immaterial mistakes or errors.

Section III Goods Subject to Free Importation

Article 21 The goods subject to free importation shall not be limited.

Article 22 The foreign trade department of the State Council and the relevant economic administrative departments of the State Council may, on the basis of the necessity for monitoring the importation of goods, exercise automatic import license administration over some of the goods subject to free importation according to the functions and duties determined by the State Council.

The list of goods that are under automatic import license administration shall be promulgated at no later than 21 days prior to its implementation.

Article 23 The import of goods that are under automatic import license administration shall be allowed.

Article 24 When importing the goods that are under automatic import license administration, the import business operators shall, prior to handling the formalities of customs declaration, file an application to the foreign trade department of the State Council or the relevant economic administrative departments of the State Council for automatic import licenses.

The foreign trade department of the State Council or the relevant economic administrative departments of the State Council shall issue automatic import licenses immediately after receiving the applications; if the circumstances are special, the time frame shall be no longer than 10 days.

The import business operators shall present the automatic import license issued by the foreign trade department of the State Council or the relevant economic administrative departments of the State Council to the customs offices for handling the formalities of customs declaration.

Section IV Goods under the Administration of Tariff Quotas

Article 25 The list of goods that are under the administration of tariff quotas shall be formulated, adjusted and promulgated by the foreign trade department of the State Council in collaboration with the relevant economic administrative departments of the State Council.

Article 26 For the goods imported under the tariff quotas, the tariffs shall be levied according to the rates within the quotas; for the goods imported beyond the tariff quotas, the tariffs shall be levied according to the rates beyond the quotas.

Article 27 The administrative departments of import quotas shall publicize the total amount of quotas for the next year between September 15 and October 14 of each year.

An applicant for quotas shall file its applications to the administrative departments of import quotas between October 15 and October 30 of each year.

Article 28 The tariff quotas may be allocated according to the principle of uniform handling of all applications.

Article 29 Where the tariff quotas are allocated according to the principle of uniform handling of all applications, the administrative department of import quotas shall decide whether to grant quotas or not before December 31 of each year.

Article 30 The import business operators shall present their certificate of tariff quotas issued by the administrative departments of import tariff quotas to the customs offices for handling the formalities of customs declaration and inspection of the goods under the tariff quotas.

The relevant economic administrative departments of the State Council shall submit in a timely manner such information as the total amount of tariff quotas for the year, the plans of allocation and the issuance of certificates of tariff quotas etc. to the foreign trade department of the State Council for archivist purposes.

Article 31 A holder of tariff quotas who has not used up its quotas for the year shall return the unused quotas to the administrative departments of import quotas prior to September 15 of the year. In case it fails to return the unused quotas and fails to use them up by the end of the

year, the administrative departments of import quotas may make corresponding deductions to the quotas of the holder for the next year.

Article 32 The administrative departments of import quotas shall, on the basis of the provisions of the present Regulations, formulate specific measures of administration so as to clarify the qualifications of the applicant, the departments for accepting applications, the principles and procedures of reviewing applications etc. and shall promulgate the measures prior to their implementation.

The department for accepting applications shall, as a general rule, be one department.

The documents requested by the administrative departments of import quotas for submission shall be limited to those documents and materials that are necessary for effecting the administration and the departments may not refuse to accept the applications under the pretext of trifle, immaterial mistakes or errors.

Chapter III Administration of the Export of Goods

Section I Goods Prohibited from Exportation

Article 33 In any of the circumstances as provided in Article 17 of the Foreign Trade Law, the goods concerned shall be prohibited from exportation. If there are relevant provisions in other laws or regulations on prohibiting the exp01iation of goods, such provisions shall be abided by.

The list of goods prohibited from exportation shall be formulated, adjusted and promulgated by the foreign trade department of the State Council in collaboration with other relevant departments of the State Council.

Article 34 No goods that are prohibited from exportation may be exported.

Section II Goods Restricted in Exportation

Article 35 In any of the circumstances as provided in Clauses 1, 2, 3, and 7 of Article 16 of the Foreign Trade Law, the goods concerned shall be restricted in exportation. Where there are provisions in other laws or regulations on limiting the exportation of goods, such provisions shall be abided by.

The list of goods restricted in exp01tation shall be formulated, adjusted and promulgated by the foreign trade department of the State Council in collaboration with other relevant departments of the State Council.

The list of goods restricted in exportation shall be promulgated at least 21 days prior to the implementation thereof; where the circumstances are urgent, it shall be promulgated at no later than the day of implementation.

Article 36 Where there are quantitative limits set by the state on the goods restricted in exportation, the goods shall be subject to the administration of quotas, and other goods restricted in exportation shall be subject to the administration of licenses.

Article 37 The goods restricted in exportation that are under the administration of quotas shall be subject to the administration of the foreign trade department of the State Council and the relevant economic administrative departments of the State Council (hereinafter collectively referred to as administrative departments of export quotas) on the basis of the functions and duties as provided by the State Council.

Article 38 For the goods restricted in exportation that are under the administration of quotas, the administrative departments of export quotas shall promulgate the total amount of export quotas for the next year prior to October 31 of each year.

An applicant of quotas shall apply to the administrative departments of export quotas for the next year between November 1 and 15 of each year.

The administrative departments of export quotas shall allocate the quotas for the next year to the quota applicants before December 15 of each year.

Article 39 The quotas may be allocated directly or by way of invitation for bids.

Article 40 The administrative departments of export quotas shall decide whether to grant quotas within 30 days of receiving the applications and at no later than December 15 of the current year.

Article 41 The export business operators shall present the certificate of quotas issued by the administrative department of export quotas to the customs offices for handling the formalities of customs declaration and examination.

The relevant economic administrative departments of the State Council shall submit such information as the total amount of quotas for the year, the plans for allocation and the issuance of certificates of quotas etc. to the foreign trade department of the State Council for archivist purposes.

Article 42 A holder of quotas who has not used up its quotas for the year shall return the unused quotas to the

administrative departments of export quotas prior to October 31 of the current year. In case it fails to return the unused quotas and fails to use them up by the end of the current year, the administrative departments of export quotas may make corresponding deductions to the quotas of the holder for the next year.

Article 43 For the goods restricted in exportation that are subject to the administration of licenses, the export business operators shall file applications to the foreign trade department of the State Council or relevant departments of the State Council (hereinafter collectively referred to as the administrative departments of export licenses). The administrative departments of export licenses shall decide whether to grant a license or not within 30 days of receiving the application.

The import business operators shall present the export license issued by the administrative departments of export quotas to the customs office for handling the formalities of customs declaration and examination.

The term "export license" as mentioned in the preceding paragraph shall refer to the various kinds of certificates and documents that are of export nature as stipulated in laws and administrative regulations.

Article 44 The administrative departments of export quotas and the administrative departments of export licenses shall, on the basis of the provisions of the present Regulations, formulate specific administrative measures so as to clarify the qualifications of the applicant, the departments for accepting applications, the principles and procedures of reviewing applications etc. and shall promulgate the measures prior to their implementation.

The department for accepting applications shall, as a general rule, be one department.

The documents requested by the administrative departments of export quotas and the administrative departments of export licenses for submission shall be limited to those documents and materials that are necessary for effecting the administration and the departments may not refuse to accept the applications under the pretext of trifle, immaterial mistakes or errors.

Chapter IV State-run Trade and Designated Operations

Article 45 The state may administer the import and export of some goods by way of state-run trade.

The list of goods for import and export under the state-run trade administration shall be formulated, adjusted and promulgated by the foreign trade department of the State Council in collaboration with other relevant economic administrative departments of the State Council.

Article 46 The foreign trade department of the State Council and other relevant economic administrative departments of the State Council shall determine and publicize the list of state-run trade enterprises according to the functions and duties as determined by the State Council.

Article 47 For the goods that are subject to the state-run trade administration, the state may allow nonstate-run trade enterprises to import and export some of the goods.

Article 48 The state-run trade enterprises shall provide to the foreign trade department of the State Council on

the semi-annual basis such information as the prices for buying or selling the goods subject to the state-run trade administration, etc.

Article 49 The foreign trade department of the State Council may, upon the necessity for maintaining the operation order of import and export, exercise designated operational administration over some of the goods during certain periods.

The list of goods subject to the administration of designated operations shall be formulated, adjusted and promulgated by the State Council.

Article 50 The specific standard and procedures for determining the enterprises to engage in designated operations shall be promulgated by the foreign trade department of the State Council before implementation.

The list of enterprises to engage in designated operations shall be publicized by the foreign trade department of the State Council.

Article 51 Unless provided in Article 47 of the present Regulations, the enterprises or other organizations that have not been included in the list of state-run trade enterprises and enterprises to engage in designated operations may not engage in the import or export of goods that are subject to state-run trade administration and designated operations.

Article 52 The state-run trade enterprises and the enterprises to engage in designated operations shall carry out their business activities under normal commercial conditions, and shall not choose suppliers according to

non-commercial considerations, nor shall they reject the entrustment of other enterprises or organizations on the basis of non-commercial considerations.

Chapter V Monitoring of Import and Export and Provisional Measures

Article 53 The foreign trade department of the State Council shall be responsible for the monitoring and assessment of the import and export of goods, shall report regularly to the State Council about the status of the import and export of goods, and give suggestions.

Article 54 In order to maintain the international balance of payments equilibrium, including the occurrence of serious international unbalance of payments or the threat of serious unbalance of payments, or to maintain a level of foreign exchange reserves that is suitable for carrying out the plans of economic development, the state may take provisional restrictive measures with regard to the value or quantity of the goods to be imported.

Article 55 In order to establish or expedite the establishment of a certain domestic industry, the state may, in case this target cannot be achieved through the incumbent measures, take provisional measures for restricting or prohibiting the import of goods.

Article 56 To implement any of the following measures, the state may, when it is necessary, take provisional measures to restrict the import of any form of agricultural products or aquatic products:

1. Taking restrictive measures over the domestic production or sale of the products that are of the same kind or that directly compete with each other;

2. Clearing up, by way of subsidizing consumptions, the domestic superfluous products that are of the same kinds or that directly compete with each other;

3. Limiting the yield of animal products whose production is completely or mainly dependent upon the import of the agricultural products or aquatic products.

Article 57 In any of the following circumstance, the foreign trade department of the State Council may take provisional measures to restrict or prohibit the export of certain goods:

1. It is necessary to restrict or prohibit the export due to the occurrence of abnormalities such as serious natural disasters;

2. It is necessary to restrict the export of goods due to serious disorder in export operations;

3. It is necessary to restrict or prohibit the export of goods as pursuant to the provisions of Articles 16 and 17 of the Foreign Trade Law.

Article 58 In case provisional measures are to be taken for restricting or prohibiting the export of goods, the foreign trade department of the State Council shall make public announcements prior to the implementation of the measures.

Chapter VI Promotion of Foreign Trade

Article 59 The State takes measures like export credit insurance, export credit, export tax rebates, establishing funds for developing foreign trade etc. to promote the development of foreign trade.

Article 60 The State takes effective measures to promote the technological innovation and technological development of the enterprises and to enhance the international competition capacity of the enterprises.

Article 61 The State helps the enterprises to exploit the international market by way of providing information consultation services.

Article 62 The business operators that import or export goods may establish or join chambers of commerce for import and export so as to achieve self-regulation and coordination.

Article 63 The State encourages the enterprises to actively respond to the discriminatory antidumping, anti-subsidy, safeguard measures or other restrictive measures of foreign countries so as to protect the lawful rights and interests of the enterprises in normal trade.

Chapter VII Legal Liabilities

Article 64 Anyone who imports or exports goods that are prohibited from import or export or imports or exports goods that are restricted in importation or exportation without approval or permission shall be subject to investigation for assuming criminal liabilities according to the provisions of the Criminal Law on smuggling; if the activities are not serious enough for assuming criminal liabilities, they shall be punished according to the relevant provisions of the Customs Law; and the foreign trade department of the State Council may revoke their business licenses for foreign trade at the same time.

Article 65 Anyone who imports or exports goods that are restricted in importation or exportation beyond the scopes

approved or permitted shall be subject to investigation for assuming criminal liabilities according to the provisions of the Criminal Law concerning the crime of smuggling or the crime of illegal operations; if the activities are not serious enough for assuming criminal liabilities, they shall be punished according to the relevant provisions of the Customs Law; and the foreign trade department of the State Council may suspend or even revoke their business licenses for foreign trade at the same time.

Article 66 Anyone who counterfeits or alters or buys or sells certificates of import or export quotas, approval documents, licenses or automatic import licenses shall be subject to assuming criminal liabilities according to the Criminal Law concerning the crime of illegal operations or the crime of counterfeiting, altering, buying or selling official documents, certificates, seals of state organs; if the activities are not serious enough for assuming criminal liabilities, they shall be punished according to the relevant provisions of the Customs Law; and the foreign trade department of the State Council may revoke their business licenses for foreign trade at the same time.

Article 67 In case any business operator of import or export who obtains quotas for the import or export of goods, certification documents or automatic import licenses by deception or other unfair means, the quotas for the import or export of goods, certification documents or automatic import licenses shall be taken back, and the foreign trade department of the State Council may suspend or even revoke their business licenses for foreign trade at the same time.

Article 68 In case anyone violates the provisions of Article 51 of the present Regulations by engaging in the import or export of goods that are subject to state-run trade administration or designated operations and thus disrupts the market order and where the circumstances are serious, it shall be subject to assuming criminal liabilities according to the provisions of the Criminal Law on the crime of illegal management; if the activities are not serious enough for assuming criminal liabilities, they shall be given administrative punishments by the administrations for industry and commerce, and the foreign trade department of the State Council may suspend or even revoke their business licenses for foreign trade at the same time.

Article 69 Any state-run trade enterprise or designated-operation enterprise violates the provisions of Articles 48 and 52 of the present Regulations shall be given a warning by the foreign trade department of the State Council; if the circumstances are serious, its qualifications as a state-run trade enterprise or designated-operation enterprise may be suspended or even revoked by the foreign trade department of the State Council.

Article 70 Any staff member engaged in the administration of the import or export or goods that, in the process of performing its functions of administration over the import or export of goods, abuses its power or neglects its duties or accepts or exacts property or money from other people by taking advantage of its functions shall be subject to assuming criminal liabilities according to the provisions of the Criminal Law concerning the crime of abusing power or the crime of neglecting duties or the crime of accepting bribes or other crimes; if the activities are not

serious enough for assuming criminal liabilities, it shall be given administrative punishments.

Chapter VIII Supplementary Provisions

Article 71 Anyone who refuses to accept the decision of the administrative organs as provided in the present Regulation on the granting of quotas, tariff quotas, licenses or automatic licenses or to accept the decision on determining the qualifications of state-run trade enterprises or designated-operation enterprises or accept the decision on administrative punishments may plead for administrative reconsideration or institute a lawsuit at the people's court in accordance with the law.

Article 72 The provisions of the present Regulations shall not foreclose the taking of measures such as tariff, inspection and quarantine, security, environmental protection, intellectual property etc. according to the provisions of laws or administrative regulations over the goods imported or exported.

Article 73 The export of goods under export control like nucleus products, nucleus-related civil products; monitored chemical products, military products etc. shall be handled according to the provisions of relevant administrative regulations.

Article 74 Where it is necessary to take antidumping, anti-subsidy or safeguard measures against imported goods, the provisions of the Foreign Trade Law and other relevant laws and administrative regulations shall be observed.

Article 75 Where there are otherwise provisions in laws or regulations concerning the import or export of goods

of special economic zones like the bonded areas or export processing areas etc, such provisions shall be observed.

Article 76 The foreign trade department of the State Council shall be responsible for the bilateral or multilateral discussions and negotiations concerning the import and export of relevant goods, and shall be responsible for settling trade disputes.

Article 77 The present Regulations shall take effect as of January 1, 2002. The Interim Regulations of the People's Republic of China on the License of Import of Goods which was promulgated by the State Council on January 10, 1984, the Interim Measures on the Administration of Export Commodities which was ratified by the State Council on December 21, 1992 and issued by the MOFTEC on December 29, 1992, the Interim Measures on the Administration of the Import of Machinery and Electrical Equipments which was ratified by the State Council on September 22, 1993 and jointly issued by the State Economic and Trade Commission and the MOFTEC on October 7, 1993, the Interim Measures on the Administration of Quotas for the Import of General Commodities which was ratified by the State Council on December 22, 1993 and jointly issued by the State Development Planning Commission and the MOFTEC on December 29, 1993, and the Interim Measures on the Administration of the Operations of Importing Goods which was ratified by the State Council on June 13, 1994 and jointly issued by the MOFTEC and the State Development Planning Commission on July 19, 1994 shall be concurrently repealed.

LIST OF THE FOURTH BATCH OF DEPARTMENTAL DECISIONS ABOLISHED BY THE MINISTRY OF FOREIGN TRADE AND ECONOMIC COOPERATION, DATED MARCH 21, 2002

The Ministry of Foreign Trade and Economic Cooperation

Order of the Ministry of Foreign Trade and Economic Cooperation

No.24

In order to adapt to the new situation of our country's opening-up to the outside world, to further establish and improve the legal system of the socialist market economy, to earnestly perform the promises of our country's entry to the WTO, to accelerate the transformation of the functions of the government and to improve the level of administration according to law, the Ministry of the Foreign Trade and Economic Cooperation has fully screened the existing departmental regulations. And after the screening, MOFTEC has decided: the list of the fourth batch of 26 departmental decisions abolished (see Attachment).

Minister of the Ministry of Foreign Trade and Economic Cooperation: Shi Guangsheng

March 21, 2002

List of the Fourth Batch of Departmental Decisions Abolished by the Ministry of Foreign Trade and Economic Cooperation

Attachment:

The list of the fourth batch of 26 departmental decisions abolished

No.	Document Name	Department of Promulgation	Date of Promulgation
1	Detailed Rules for the Implementation of the Administration of the Technology Import Contracts of the People's Republic of China	MOFTEC	1987
2	Notice of the Ministry of Foreign Trade and Economic Cooperation and the Ministry of Science and Technology on the Printing and Distribution of the Measures for the Administration of the Technologies Restricted from Export	MOFTEC, Ministry of Science and Technology	1998

3	Notice of the Ministry of Foreign Trade and Economic Cooperation on Changing the Table of the Explanation of End User and Ultimate Use	MOFTEC	1996
4	Notice of the State Bureau of the Construction Material Industry and the Ministry of Foreign Trade and Economic Cooperation on Strengthening the Administration of the Export of Concrete Production and Equipment Technologies	State Bureau of Construction Material Industry, Ministry of Science and Technology	1990

5	Notice of the Ministry of Foreign Trade and Economic Cooperation on the Execution of the Relevant Provisions of the Notice on the Relevant Issues of Strengthening the Administration on the Sales and Payment of Foreign Exchange for the Import of Intangible Assets	MOFTEC	2001
6	Supplementary Notice on Strengthening the Administration of Technology Import Contracts and Sales and Payment of Foreign Exchange	MOFTEC, State Administration of Foreign Exchange	2001

7	Notice of the Ministry of Foreign Trade and Economic Cooperation on Explaining Article 71 of the Regulations on the Implementation of the Law of the People's Republic of China on Sino-foreign Joint Ventures	MOFTEC	1985
8	Notice of the Ministry of Foreign Trade and Economic Cooperation on Explaining Article 74 of the Regulations on the Implementation of the Law of the People's Republic of China on Sino-foreign Joint Ventures	MOFTEC	1985

9	Notice on Strengthening the Administration of the Labor Cooperation Carried out in Singapore by Chinese Companies	MOFTEC	1996
10	Letter on Strictly Executing the Provisions of the Compensation Committee of the United Nations on the Distribution of Reparations	MOFTEC	1997
11	Notice on the Relevant Matters Concerning Strengthening the Administration of Production and Export of Vitamin C	MOFTEC, State Administration of Medicine	1997

12	Notice on the Supplementary Provisions of the Notice on the Relevant Matters Concerning Strengthening the Administration of Production and Export of Vitamin C	MOFTEC, State Administration of Medicine	1998
13	Notice on the Relevant Issues Concerning the export of Honey to America	MOFTEC	2001
14	Measures for the Administration of the Quotas of the Industrial Products Exported to the European Union (Interim) MOFTEC	MOFTEC	1999

15	Notice on the Relevant Supplementary Provisions of the Measures for the Administration of the Quotas of the Industrial Products Exported to the European Union (Interim)	MOFTEC	2000
16	Notice on Several Matters Concerning Encouraging the Enterprises to Make Good Use of the Quotas	MOFTEC	1999
17	Notice on the Relevant Matters regarding the Use of Quotas of Textiles Subject to the License of Freely Applied Total Amount by Foreign-funded Enterprises	MOFTEC	1999

18	Notice on the Relevant Matters Concerning the Free Application for Quotas of Textiles of 2001	MOFTEC	2000
19	Notice of the Ministry of Foreign Trade and Economic Cooperation on the Cancellation of the Quotas of 6 Categories (Men's Shirts with Sewed Collars) of Textiles by Canada	MOFTEC	1997
20	Notice on the Relevant Matters Concerning Adopting the Freely Applied Visa of Limited Total Number to the Categories of Textiles not in Bad Need	MOFTEC	1998

21	Notice on the Relevant Matters Concerning Strengthening the Administration of Quotas of the Textiles Subject to the Freely Applied License of Limited Total Number	MOFTEC	1999
22	Notice on the Exhibition Organization by the Guaranteed Stands of the Chinese Export Commodities Fair	MOFTEC	1998
23	Notice on Printing and Distributing the Relevant Materials of the Agency Agreement on Frozen Meat Fowls Supplied to Hong Kong and Macao (Sample)	MOJTEC	1996

24	Notice on Revising the Relevant Measures for Trade with Taiwan Province	MOFTEC	1988
25	Notice on Opening the Import Management Power in Trade with Taiwan	MOFTEC	1998
26	Notice on Printing and Distributing the Interim Provisions on the Procedures for Going Abroad of Labors Sent Abroad	MOFTEC, Ministry of Public Security Ministry of Foreign Affaires	1997

EXCERPT OF STATEMENT BY THE HEAD OF THE CHINESE DELEGATION ON THE TRANSITIONAL REVIEW OF CHINA BY THE COUNCIL FOR TRADE IN GOODS OF THE WORLD TRADE ORGANIZATION, DATED NOVEMBER 29, 2002

WORLD TRADE ORGANIZATION
Council for Trade in Goods

G/C/W/441
29 November 2002

(02-65X2)

Original: English

STATEMENT BY HEAD OF THE CHINESE DELEGATION ON THE TRANSITIONAL REVIEW OF CHINA BY THE COUNCIL FOR TRADE IN GOODS

The following statement, which was made at the meeting of the Council for Trade in Goods on 22 November 2002, has been received from the Permanent Mission of the People's Republic of China with the request that it be circulated to Members.

I appreciate the opportunity of having the floor to address the Council on the implementation of China's commitments with regard to trade in Goods within the framework of paragraph 18 of China's Protocol of Accession.

A strong delegation, composed of the senior officials from relevant administrative authorities including the State Development Planning Commission (SDPC), the

State Economic and Trade Commission (SETC), Ministry of Finance and the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), has been assembled to address the comments and concerns of other Members in this review. We hope that candid exchange of ideas and effective clarification can be achieved through this annual mechanism. Following the "Information to be provided by China in the context of the Transitional Review Mechanism" as specified in the Annex 1A to the Accession Protocol of China, it's expected that my introduction will help Members better understand the efforts and achievements China has made in this respect after its accession to the WTO.

* * *

Part Two: Implementation of WTO Obligations and Commitments

1. Adherence to the principle of non-discrimination

In line with its commitments, to provide full national treatment to imported products, the Chinese Government has repealed or modified the laws, regulations and other measures applying to internal sale, offering for sale, purchase, transportation, distribution, or use of: after sale service, pharmaceutical products, cigarettes, spirits, chemicals and boiler and pressure vessels.

- Regarding the after sales service, on 11 March 2002, the Ministry of Foreign Trade and Economic Cooperation annulled its Decree No. 3 of 1993 in its Public Notice No. 12 of 2002, and thereby fulfilled the commitment in this regard. The annulled Decree

was on after sales service and was considered to be inconsistent with the principle of national treatment by a number of WTO Members during China's WTO accession negotiations.

- Regarding cigarettes, administrative measures taken by the State Tobacco Monopoly Administration have already led to a substantial increase of the number of retail outlets for imported cigarettes in China. The commitment of unification of the licensing requirements for both the domestic and imported cigarettes will be fulfilled by way of amending the Decree No. 2 of the State Tobacco Monopoly Administration, which is now under way. In the renewal of licenses in year 2003, a unified license will be issued for retail sale of both domestic and imported cigarettes, and the former special license for retail sale of imported cigarettes as well as the requirement that only those outlets with the special license are permitted to sell imported cigarettes will be abolished. Therefore, China will be able to fulfill the commitment of applying national treatment in this regard after the two-year transitional period.

- Regarding boilers and pressure vessels, the newly formulated Regulations on the Management and Supervision of Manufacturing of Boilers and Pressure Vessels will enter into force on 1 January 2003. Draft of the Regulations was notified to the TBT Committee of the WTO in May this year (G/TBT/N/CHN/1). Article 18 of the new Regulation specified a 4 year validity for the Certificate of Production, which applies equally to both domestic and imported products. The relevant standards on the charges are

in the process of drafting and will be enforced after the endorsement by the Sate Development Planning Commission and Ministry of Finance. A uniform charging standard will be ensured for products both domestically made and imported.

For pharmaceutical products, chemicals and spirits, a transitional period of 1 year was reserved as provided by China's accession protocol. During the course of this year, constructive measures have been taken to amend or abolish the related laws and regulations, thanks to these efforts, the conformity with the national treatment requirements has been practically attained well ahead of the committed date.

- Regarding pharmaceutical products, the former Provisional Measures on Administration of Prices of Pharmaceutical Products has been replaced by Measures on Administration of Government Pricing for Pharmaceutical Products, with which the principle of national treatment is observed in procedures and formulas for pricing and classification of pharmaceutical products.
- Regarding spirits, new administrative measures are at the stage of formulation. The new measures on spirits will regulate the products and markets of spirits on the basis of safety and quality requirements, regardless the origin of the spirits.
- Regarding the chemicals, specifically the registration procedures applicable to imported chemical products, the State Administration of Environmental Protection is now amending the Provisions on the Environmental Administration of Initial Imports of Chemical Products

and Imports and Exports of Toxic Chemical Products in collaboration with the MOFTEC and the General Administration of Customs, and the amended rules will be in conformity to the principle of national treatment and internationally accepted practices. Draft of the amended rules has been publicized by the State Environmental Protection Administration for public comments, with a view of its enforcement before the end of the transitional period. Moreover, the legislation on new chemical substances is also under way to align our governing procedures with international principles.

2. Non-automatic export licensing requirements under WTO agreement and accession commitments

China maintains export administration of a small number of products for the purposes of protecting public interest, avoiding shortage in domestic supply, conserving the exhaustible natural resources, or undertaking obligations under international treaties or intergovernmental agreements, which are in conformity to GAT1994. From 1 January 2002, China gave up export administration of Chinese chestnut, reed mat, red bean, honey, colophony, tung wood and the board (to Japan), vitamin C and etc. There are now still 54 products subject to export administration, including live bovine and beef (to Hong Kong, China and Macao, China), live swine and swine meat (to Hong Kong, China and Macao, China), fowls and meat (to Hong Kong, China and Macao, China), garlic, tea, wheat, corn, rice, liquorices roots and their products, rushes and their products, sugar, bauxite, light (dead)-burned magnesia, talc, fluorspar, rare earth, tungsten ores and products, antimony ores and products, tin, zinc,

coal, coke, crude oil, processed oil, paraffin wax, artificial corundum, heavy water, ozonosphere depleting materials, chemicals under supervision and control, chemicals used to produce narcotics, sawn wood, silk, greige, cotton, woven fabrics, silver, platinum, certain steel products (to the U.S.), and etc. These export administrative measures have been notified to the WTO.

* * * *

MEASURES FOR THE ADMINISTRATION OF EXPORT COMMODITIES QUOTAS PROMULGATED BY THE MINISTRY OF FOREIGN TRADE AND ECONOMIC COOPERATION, EFFECTIVE JANUARY 1, 2002

Order No. 12 of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China on MEASURES FOR THE ADMINISTRATION OF EXPORT COMMODITIES QUOTAS

In accordance with the *Law of the People's Republic of China on Foreign Trade* and the *Regulations of the People's Republic of China on the Administration of the Import and Export of Goods*, the Measures for the Administration of Export Commodities Quotas has been approved after discussion at the 9th ministerial meeting of the Ministry of Foreign Trade and Economic Cooperation of 2001 and is hereby promulgated, and shall come into force on January 1, 2002.

Minister of the Ministry of Foreign Trade and Economic Cooperation: Shi Guangsheng

December 20, 2001

Measures for the Administration of Export Commodities Quotas

Chapter I General Provisions

Article 1 In order to standardize the administration of export commodities quotas, to guarantee that the administration of export commodities quotas is consistent with the principles of efficiency, justice, openness and transparency and to safeguard the normal exports of commodities subject to quota administration, these Measures have been formulated according to the relevant provisions of the Law of the People's Republic of China on Foreign Trade (hereinafter referred to as the Foreign Trade Law) and the Regulations of the People's Republic of China on the Administration of Goods Import and Export (hereinafter referred to as the Regulations on Goods Import and Export).

Article 2 The Ministry of Foreign Trade and Economic Cooperation (hereinafter referred to as MOFTEC) shall be responsible for the administration of export commodities quotas of the whole country. The commissions (departments, bureaus) of foreign trade and economic cooperation of the provinces, autonomous regions, municipalities directly under the Central Government and municipalities separately listed on the State plan (hereinafter referred to as the local administrative authorities of foreign trade and economic cooperation) shall, based on the authorization of MOFTEC, be responsible for the administration of export commodities quotas within their respective area.

Article 3 According to the provisions of Article 35 and Article 36 of the Regulations on Goods Import and Export, MOFTEC applies export quota administration with respect to the commodities restricted from export by the State.

Article 4 These Measures shall be inapplicable to the following commodities subject to export quota administration:

1) Export commodities subject to quota bidding or under the administration of "pay to use";

2) Export commodities subject to passive quota administration according to the provisions of multilateral or lateral agreements;

3) Commodities listed in the appendixes of these Measures.

Article 5 These Measures shall be applicable to the exports of the commodities subject to quota administration in various trade forms.

Article 6 The valid term of export commodities quotas shall expire on December 31 of their current year.

Chapter II The list of export commodities subject to quota administration

Article 7 The list of export commodities subject to quota administration shall be formulated, adjusted and promulgated by MOFTEC.

Article 8 The list of export commodities subject to quota administration shall be promulgated at least 21 days before the implementation; and in case of emergency, shall be promulgated not later than the day of implementation.

Chapter III Total Amount of Export Quotas

Article 9 The total amount of export commodities quotas shall be determined and promulgated by MOFTEC.

Article 10 When determining the total amount of export commodities quotas, MOFTEC shall take the following factors into consideration:

1) needs of guaranteeing the safety of the national economy;

2) needs of protecting the limited domestic resources;

3) development planning, objectives and policies of the State on the relevant industries;

4) demands of the international and domestic markets, and the production and sales status.

Article 11 MOFTEC shall promulgate the total amount of export quotas of the next year before October 31 of each year.

Article 12 MOFTEC may adjust the total amount of export commodities quotas for a year according to the actual needs, but the relevant adjustments shall be finished and promulgated no later than September 30 of that current year.

Chapter IV Application for Export Quotas

Article 13 The export enterprises that have the license or qualification for import and export management and have no violation of laws and rules in economic activities in the last 3 years may apply for the export commodities quotas.

Article 14 The enterprises under local administration shall file the applications for quotas to the local administrative authorities of foreign trade and economic cooperation; the local administrative authorities of foreign trade and economic cooperation shall, after examining and gathering the applications of the enterprises of their respective areas, report to MOFTEC according to the requirements of MOFTEC. The enterprises under central administration shall directly apply to MOFTEC for the export commodities quotas.

Article 15 The export enterprises shall file the quota applications in formal written form, and shall submit the relevant documents and materials according to the requirements.

Article 16 MOFTEC shall accept the applications for the export commodities quotas of the next year presented by the local administrative authorities of foreign trade and economic cooperation and the enterprises under central administration from November 1 to 15 each year, and shall not accept the applications filed at any other time.

Chapter V Distribution, Adjustment and Management of Export Quotas

Article 17 MOFTEC shall distribute the export commodities quotas to the local administrative authorities of foreign trade and economic cooperation and the enterprises under central administration; and the local administrative authorities of foreign trade and economic cooperation and the enterprises under central administration shall, within the amount of quotas of their respective area and according to these Measures and the relevant provisions of

the State on the administration of goods export, distribute the quotas to the enterprises of their respective area that have filed applications.

Article 18 MOFTEC shall distribute the export quotas of the next year to the local administrative authorities of foreign trade and economic cooperation and the enterprises under central administration before December 15 of each year; and the administrative authorities of foreign trade and economic cooperation shall timely distribute the quotas handed down by MOFTEC to the applying enterprises of their respective area. If there exist precarious factors in the international market, MOFTEC may distribute the export quotas of the next year in two lots. In the first distribution, no less than 70% of the total amount of quotas of the next year shall be distributed before December 15 of each year; and the rest part shall be distributed no later than June 30 of the following year.

Article 19 When distributing the quotas, MOFTEC and the local administrative authorities of foreign trade and economic cooperation shall take into full consideration the export performance of that commodity, the utilization rate of quotas, the business management capacity, the production scale and the resources status etc. of the applying enterprise or area in the last 3 years.

Article 20 Under any of the following circumstances, MOFTEC may increase or reduce the quotas that have already been distributed to the local administrative authorities of foreign trade and economic cooperation or the enterprises under central administration:

1) Major changes take place in the international market;

2) Major changes of domestic resources take place;

3) the quota use paces between the areas or the enterprises under central administration are obviously unbalanced.

Article 21 The local administrative authorities of foreign trade and economic cooperation shall, in line with the principle of increase of utilization rate of quotas, inspect the enforcement of export commodities quotas of their respective area regularly, and shall take back the distributed quotas and redistribute them with respect to those of which the utilization rate fail to meet the prescribed requirements.

Article 22 The local enterprises shall return the annual quotas that they fail to use to the local administrative authorities of foreign trade and economic cooperation in time, and the local administrative authorities of foreign trade and economic cooperation may redistribute the quotas within their respective area or hand them in to MOFTEC in the current year.

The enterprises under central administration shall directly return the annual quotas they fail to use to MOFTEC before October 31 of the current year.

Article 23 If the local administrative authorities of foreign trade and economic cooperation or the enterprises under central administration fail to return the quotas according to the provisions of Article 22 of these Measures, and fail to implement all the quotas of their respective enterprise or area before the end of the current year, MOFTEC may deduct their corresponding quotas in the next year.

Article 24 MOFTEC and the local administrative authorities of foreign trade and economic cooperation shall notify the relevant export license issuing bodies about the quota distribution and the adjustment results at the same time; the distribution results and the adjustment plans of the local administrative authorities of foreign trade and economic cooperation shall be reported to MOFTEC for record within 30 days of the day on which the decision is promulgated.

Article 25 The export enterprises shall, based on the quota certifications issued by MOFTEC or the local administrative authorities of foreign trade and economic cooperation and according to the provisions on the administration of export license, apply to the license issuing bodies authorized by MOFTEC for the export quota licenses, and go through the procedures for goods examination and release at Customs based on the export quota licenses.

Chapter VI Legal Responsibilities

Article 26 Where any export operator exports export commodities subject to quota administration beyond the scope approved or licensed or without approval by the means of falsely reporting the commodity name or reporting less export amount, etc., he shall be punished according to the provisions of Article 65 of the Regulations on Goods Import and Export, and MOFTEC may cancel the export commodities quotas he has already obtained.

Article 27 If anyone forges, alters or trades the export commodities quota certificates, documents of approval or export quota licenses, he shall be punished according to

the provisions of Article 66 of the Regulations on Goods Import and Export, and MOFTEC may cancel the export commodities quotas he has already obtained.

Article 28 Where any export operator obtains the export commodities quotas, documents of approval or export quota licenses through deception or other improper ways, he shall be punished according to the provisions of Article 67 of the Regulations on Goods Import and Export, and MOFTEC may cancel the export commodities quotas he has already obtained.

Article 29 Where the local administrative authorities of foreign trade and economic cooperation distribute the quotas in violation of the provisions of these Measures or the provisions of the State on the administration of state-run trade or designated operations, they shall be punished according to the relevant provisions of the Administrative Penalties Law, and MOFTEC may notify them to make corrections and give them warnings.

Article 30 Where anyone has objections against the decisions on quota distribution or decisions on penalties made by MOFTEC, he may either apply for administrative review according to the Administrative Review Law, or bring a lawsuit before the people's court.

Chapter VII Supplementary Provisions

Article 31 The export commodities quotas of enterprises with foreign investment shall be handled according to the relevant provisions.

Article 32 The power to interpret these Measures shall remain with MOFTEC

Article 33 These Measures shall enter into force on January 1, 2002. The Interim Measures of the Ministry of Foreign Trade and Economic Cooperation for Reporting, Distributing and Enforcing Export Commodities Quotas promulgated by MOFTEC on October 6, 1998, and the Rules for the Implementation of Interim Measures for Reporting, Distributing and Enforcing Export Commodities Quotas promulgated by MOFTEC on January 2, 1999 shall be nullified simultaneously.

SUMMARIES OF THE MAY 23, 2002 AND JANUARY 23, 2003 MEETINGS OF THE VITAMIN C SUBCOMMITTEE

Meeting Summary

On May 23, GM Kong and Wang Qi of our Company attended the VC Chapter Meeting in Dalian, which was hosted by CCCMHPIE and attended by broader export enterprises. The meeting agenda was as follows:

1. Revise bylaws of the VC Chapter and make relevant bylaws;
2. Select new Chairman and directors of the Chapter;
3. Board meeting.

This meeting was attended by 5 production enterprises and 3 foreign trade enterprises with the following participants:

1.	CCCMHPIE:	Zhang Changxin, Qiao Haili, Wan Ning
2.	NEPG:	Chen Gang, Wang Renzhi
3.	Jiangshan:	GM Kong, Wang Qi
4.	Weisheng:	Feng Zhenying, Yu Tao, Wang Yaguang, Li Cunwei (of Imp. & Exp. Co. of CSPC)
5.	Welcome:	Zhang Yingren (Deputy GM)
6.	Shanghai Sunve:	Xu Yaosheng
7.	China National Pharmaceutical Foreign Trade Corp.:	Zhao Jun

8. China National Medicines & Health Products Imp. & Exp. Corp.: Liu Yuehua
9. Jiangxi Medicine & Health Products Imp. & Exp. Co., Ltd.: Long Ying

Below is the summary of the meeting:

1. Revise VC Chapter's bylaws and make relevant bylaws

   The draft was passed in principle. Details were allowed to be brought back by attending companies to study. If a company has revisions, it must propose the change(s) by the end of this month in writing.

   A company can apply to join the VC Chapter, whether it has or hasn't done VC business.

   A company, without being a member of the VC Chapter, can export VC (but the export quantity needs to be confirmed by other companies).

2. Select new Chairman and directors

   The meeting discussed and passed the board of directors of the VC Chapter formed by the four VC producers (Shanghai Sunve was not included) and CCCMHPIE. In the meantime, an investigation team was also set up to serve as a monitor of the board. The team was formed by foreign trade enterprises. The Secretary General of the VC Chapter will serve as the team leader and China National Medicines & Health Products Imp. & Exp. Corp. and Jiangxi Medicine & Health Products Imp. & Exp. Co., Ltd. constitute the current investigation team.

3. Board meeting

The board meeting was attended only by the representatives of the four production enterprises (Sunve was not included) and CCCMHPIE.

- Selection of the Chairman

  Director of the Western Medicine Dept. of CCCMHPIE serves as the Chairman and the four production enterprises will rotate their turn of acting as the Vice-Chairman of the board. The rotation order is as follows: NEPG, Jiangshan, Weisheng and Welcome. The term is from Jan. 1 to Dec. 31.

  The current board of directors is:

Chairman: Qiao Haili	Vice-Chairman: NEPG
Directors:	Jiangshan, Weisheng and Welcome
Secretary General:	Qiao Haili
Deputy Secretary General:	Wang Ning
Advisor:	Zhang Changying

- Whether to set up a Board fund

  It was decided that a standing board fund will not be set up. Rather, the board meetings will be organized by the company which serves as the Vice-Chairman. Meeting expenses will be paid by the acting company in advance and will be divided up and paid by the four producers at the end of the year. Accommodations for the participants of the four companies will be paid by each company.

  Transportation and meeting expenses for CCCMHPIE will be paid by the acting company in advance and will be divided up and paid by the four producers at the end of the year.

Reference material: Jan. - Mar. Export Quantity of Each Producer (compiled by customs)

	Actual export
NEPG	3,240.13
JJPC	2,538.4
Weisheng	3,396.4
Welcome	1,445.475

Reported by: Wang Qi 05/25/2002

On Jan. 23, 2003, CCCMHPIE held a VC Chapter meeting in Panjiayuan, Beijing. The following companies and people attended the meeting:

CCCMHPIE:	President Feng, Qiao Haili, Wan Ning
NEPG:	Chen Gang, Wang Renzhi
Jiangshan:	Kong Tai, Wang Cheng, Wang Qi
Weisheng:	Feng Zhenying, Yu Tao, Wang Yaguang, Guo Guoping
Welcome:	Zhang Yingren

The main points and information of this meeting were as follows:

CCCMHPIE made public some statistical information (according to the stamped contracts):

Jan. - Nov. 2002 Export Situation

	Avg. price (USD)	Total quantity (Ton)	Total amount (USD)
Total China VC export	USD3.20/kg	35,166.982 tons	112,610,191
Of which, export to EU	USD3.10/kg	15,142.850 tons	47,006,534
export to the US	USD3.21/kg	10,551.188 tons	33,919,945

Jan. -17 (as *shown in Chinese source document, maybe a typo?– Translator's note)* 2003 Export Stamp Application Situation

Price (USD/kg)	>9.00	8~9.00	7~8.00	6~7.00	5~6.00	4~5.00	<4.00
Quantity (Ton)	457.5	73	105	450	344.5	719	620

Note: NEPG has more high-priced contracts and Jiangshan has more low-priced contracts.

Drafted by: Wang Qi Jan. 25, 2003

VC Chapter Meeting Memo (10/12/04)

On Oct. 12, 2004, a VC Chapter meeting was held in the Shanghai Magnificent International Hotel. Companies and people attending this meeting were:

CCCMHPIE:	Qiao Haili, Wan Ning
NEPG:	Chen Gang, Wang Renzhi
Jiangshan:	Kong Tai, Wang Cheng, Wang Qi
Weisheng:	Feng Zhenying, Wang Yaguang, Wang Xiaobin
Welcome:	Huang Pinqi, Zhang Yingren
Hualong:	Feng Yanming and another person
Anhui Tiger:	Chairman Wu of its board.

Main points and information of this meeting are below:

CCCMHPIE made public relevant statistical information (according to the stamped contracts):

Jan. - Aug. 2004 Export Situation

	Avg. price	Total quantity (Ton)	Unit price of the same period last year
Total China VC export	USD4.93/kg	40,906 tons	USD6.98/kg
Of which, export to EU	USD4.60/kg	17,000tons	/
export to the US	USD4.84/kg	13,000 tons	USD6.13/kg
export to Japan	USD6.74/kg	2,808 tons	/

Note: Due to the EU gaining 10 new members, above data is less comparable.

Jan. - Aug. 2003 Domestic Producers'
Export Data under Self-managed Export

Producer	Quantity (Ton)	Unit Price (USD/kg)
NEPG	13653	4.83
Welcome	8574	4.71
Jiangshan	8304	4.83
Weisheng	6211	5.11
Shangdong Hualong	1152	5.13
Anhui Tiger	573	4.27

Note: Data on our Company is not accurate, because our VC granule exports used a different HTS code.

Drafted by: Wang Qi Oct. 16, 2004

COMMENTS OF THE CHINA CHAMBER OF COMMERCE OF METALS, MINERALS & CHEMICALS IMPORTERS AND EXPORTERS ON MARKET ORIENTED ENTERPRISE ON THE U.S. DEPARTMENT OF COMMERCE'S MAY 3, 2004 FEDERAL REGISTER NOTICE, DATED MAY 19, 2004

Comments of the China Chamber of Commerce of Metals, Minerals Chemicals Importers & Exporters on Market Oriented Enterprise

We are the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters. With a membership of over 4,000, we are the largest and most representative association in the fields of metals, minerals and chemicals. We attach great importance to the issue of the DOC granting individual respondents market-economy treatment (MET) in anti-dumping proceedings and are grateful for the opportunity to comment.

With the following comments we argue that market economy status should be granted to China in anti-dumping investigations and that individual respondents should be considered for MET. For quite a long time, the US and China have held different opinions on China's market economy status. It is a prejudice against Chinese respondents that DOC refuses to recognize China's market-economy status.

It is well known China has established a market economy system over the past 20 years. The government, at both national and local levels, has faded out from direct involvement in the management of enterprises and

become a macro regulator. It has no right to fix the prices for these enterprises, whether they are state-owned or privately owned, nor does it have the ability to influence prices by interfering in the purchase of raw materials, the channels of distribution, or company business practices. Additionally, a basic legal system for the market economy has been established in China. This system protects the independence and autonomy of enterprises, and ensures that the nature and quantity of the goods to be produced are decided by the producer at his own will, according to the demand in the market. Even state-owned enterprises are operated under the rules of market economics. Therefore, domestic prices of Chinese products as a whole are not interfered with, and they are reliable. All Chinese enterprises operate in a competitive and fully open market that relies on supply and demand to for price determinations.

With regard to the methods employed by the United States to determine China's current market economy status, we believe that, the analyses are partial and the criteria used to decide whether or not to grant this status to China is doubtful. Although China's market economy is not perfect at present, this imperfection is quite normal. There is no perfect market economy in any country in the world, including those recognized as market economies by the U.S. The key issue is whether the U.S. will adopt the same criteria when granting market economy status to China as it did with other countries. In addition, the mechanism of market economy treatment itself is worth arguing on the grounds of accuracy and fairness. We are curious why it is necessary to conduct a complicated and rigorous investigation before granting market economy

status to China when other countries were able to achieve such status almost automatically.

As the representative for China's metals, minerals and chemicals industries, we argue that these industries already meet U.S. standards of market oriented enterprise (MOE). We are puzzled as to why the DOC continues to use the same criteria to examine China's industries. Although the intention to grant individual respondent market economy treatment is a positive step, we think that the DOC should take into consideration that the overwhelming majority of Chinese enterprises already function within the rule of the market economy without governmental influence. Currently, the vast majority of Chinese industries have met the three MOE criteria, yet none have been recognized as MOE.

We firmly believe that the market-based prices of Chinese enterprises should be compared to the broader economic environment when considering granting individual Chinese respondents MET. When calculating production cost, only the data submitted by the enterprises should be used to determine the cost of different factors of production, including labor, land, power, and water. Some parties think that the firms' input prices are distorted under the broader NME environment, but this conclusion is unfair. DOC should respect the fact that Chinese enterprises work under the rule of the market economy and should grant Chinese enterprises full MET instead of partial MET. Furthermore, DOC should remove the measure of "double counting" when conducting AD/CVD investigations against the products imported from China, as it is against U.S. law and its WTO obligations. It is unfair and discriminatory.

China Chamber of Commerce for Import & Export of Machinery & Electronic Products

14th Floor, North Office Tower, New World Center

No. 3B, Chongwenmen Wai Street, Beijing, China

PC: 100062 Tel: ++86-10-67092715/67092716

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E-mail: law@cccme.org.cn

May 19, 2004

Mr. James J. Jochum

Assistant Secretary for Import Administration

U.S. Department of Commerce

Central Records Unit, Room 1870

Pennsylvania Avenue and 14th Street NW

Washington, DC 20230

Re: Public Hearings on U.S.-China Joint Commission on Commerce and Trade Working Group on Structural Issues

Dear Assistant Secretary Jochum,

China Chamber of Commerce for Import & Export of Machinery and Electronic Products (CCCME) hereby responds to the Department's May 3, 2004 Federal Register notice (69 Federal Register 24,132) inviting comments and requests testify concerning topics and issues for the U.S.-China Joint Commission on Commerce and Trade Working Group on Structural Issues.

As an interested Chinese party, we attach a written comment in an original and six copies, as well as an electronic version on CD-ROM.

We would appreciate the opportunity to make an oral presentation at the hearing on June 3. The name, address, telephone number, position and the relevant information of our representative who will make a presentation are as followed:

Mr. Liu Mei Kun, Vice President of CCCME;

Address: 14th Floor, North Office Tower,

Beijing New World Center,

No. 3B, Chong Wen Men Wai Street, Beijing, P.R. China

Tel: 0086-10-67092852; Fax: 0086-10-67092615;

E-mail: liumeikun@cccme.org.cn

We also appreciate it very much if you extend the time for our presentation beyond the five-minute time limitation.

Best wishes,

Sincerely yours,

/s/_____

Liu Mei Kun

Vice President, CCCME

PROVISIONS ON ADMINISTRATIVE PENALTIES AGAINST PRICE-RELATED UNLAWFUL PRACTICES, DATED AUGUST 1, 1999

Provisions on Administrative Penalties against Price-related Unlawful Practices

(Approved by the State Council on July 10, 1999, promulgated by the State Development and Planning Commission on August 1, 1999)

Article 1 These Provisions are formulated according to the relevant provisions of the Price Law of People's Republic of China (hereinafter referred to as Price Law) in order to penalize price-related unlawful practices according to law and protect lawful rights and interests of consumers and operators.

Article 2 The competent price control departments of the people's governments at or above the county level shall conduct supervision and inspection on price-related activities according to law, and make decisions on the administrative penalties against price-related unlawful practices.

Article 3 Administrative penalties against price-related unlawful practices shall be decided by the competent price control departments of the local people's governments at the places where the price-related unlawful practices take place; if the competent price control department of the State Council stipulates that the administrative penalties shall be decided by the competent price control departments at higher levels, such stipulations shall prevail.

Article 4 If an operator, in violation of the provisions of Article 14 of the Price Law, commits any one of the following acts, he shall be ordered to make corrections,

have his illegal earnings confiscated, and may also be fined no more than five times the illegal earnings; if there are no illegal earnings, he shall be given a warning, and may also be fined no less than 30,000 yuan and no more than 300,000 yuan; if the circumstances are serious, he shall be ordered to suspend the business for rectification, or have his business license revoked by the administrative department of industry and commerce:

(1) Collusion with others and control of the market price, which impairs the lawful rights and interests of other operators and consumers.

(2) except for the sale of fresh or live goods, seasonal commodities or obsolete stock at reduced prices according to law, dumping at prices lower than cost in order to elbow out competitors or monopolize the market, which disturbs the normal order of production and operation and impairs the rights and interests of the state and other operators.

(3) when providing the same commodities or services, carrying out price discrimination against other operators having the same trade terms.

Article 5 An operator, in violation of the provisions of Article 14 of the Price Law, who forces up prices and pushes the prices of commodities to rise too highly by fabricating and spreading price- rising information, or inveigling consumers or other operators to transact with him by employing fake or misleading price instruments, shall be ordered to make corrections, have his illegal earnings confiscated, and may also be fined no more than five times the illegal earnings; if there are no illegal earnings, he shall be given a warning, and may also be fined no less than 20,000 yuan but no more than

200,000 yuan; if the circumstances are serious, he shall be ordered to suspend the business for rectification, or have his business license revoked by the administrative department of industry and commerce.

Article 6 An operator, in violation of the provisions of Article 14 of the Price Law, who raises or depresses prices in disguised forms by selling or buying commodities or providing services by the means of driving up or down the rank, shall be ordered to make corrections, have his illegal earnings confiscated, and may also be fined no more than five times the illegal earnings; if there are no illegal earnings, he shall be given a warning, and may also be fined no less than 10,000 yuan but no more than 100,000 yuan; if the circumstances are serious, he shall be ordered to suspend the business for rectification, or have his business license revoked by the administrative department of industry and commerce.

Article 7 An operator who commits any one of the following acts by failing to implement government guided prices or government fixed prices shall be ordered to make corrections, have his illegal earnings confiscated, and may also be fined no more than five times the illegal earnings; if there are no illegal earnings, he may be fined no less than 20,000 yuan but no more than 200,000 yuan; if the circumstances are serious, he shall be ordered to suspend the business for rectification:

(1) setting prices in excess of the floating range of government guided prices;

(2) setting prices higher or lower than the government fixed price;

(3) without any authorization, laying down prices for commodities or services which shall have government guided prices or government fixed prices;

(4) advancing or postponing the implementation of government guided prices or government set prices;

(5) laying down charging items or standards for charges by himself;

(6) increasing charging standards in disguised forms such as disintegrating charging items, charging repeatedly and widening charging range;

(7) continuing to charge fees on the items that the government has abolished by formal decree;

(8) violating of provisions, charging fees in disguised forms such as cash deposits or liens;

(9) providing services and charging fees in compulsion or in disguised compulsion forms;

(10) providing services not in conformity with provisions but charging fees;

(11) other acts of not implementing the government guided prices or government fixed prices.

Article 8 An operator who does not implement legal price intervention measures or emergency measures and commits any one of the following acts shall be ordered to make corrections, have his illegal earnings confiscated, and may also be fined no more than five times the illegal earnings; if there are no illegal earnings, he may be fined no less than 40,000 yuan but no more than 400,000 yuan; if the circumstances are serious, he shall be ordered to suspend the business for rectification:

(1) not obeying the system of price-raising declaration or of price-adjusting record;

(2) exceeding the range of the price difference ratio or profit ratio;

(3) not implementing the prescribed limited price or lowest protective price;

(4) not implementing the measure for centralizing price-setting authorities;

(5) not implementing the measure for freezing prices;

(6) other acts of not implementing legal price intervention measures or emergency measures;

Article 9 If the operator mentioned from Articles 4 to 8 is an individual, he may be fined no more than 50,000 yuan for his price-related unlawful practices without any illegal earnings.

Article 10 An operator, in violation of laws or regulations, who makes exorbitant profits shall be ordered to make corrections, have his illegal earnings confiscated, and may also be fined no more than five times the illegal earnings; if the circumstances are serious, he shall be ordered to suspend the business for rectification, or have his business license revoked by the administrative department of industry and commerce.

Article 11 An operator who, in violation of the provisions on clear marking of prices, commits any one of the following acts shall be ordered to make corrections, have his illegal earnings confiscated, and may also be fined no more than 5,000 yuan:

{1) not marking prices;

(2) not marking prices according to prescribed contents and forms;

(3) selling commodities with extra charges in addition to marked prices, or charging unmarked fees;

(4) other acts of violating the provisions on clear marking of prices.

Article 12 Those who refuse to provide information that is necessary to price supervision and inspection or provide fake information shall be ordered to make corrections and given a warning; if no corrections are made by the expiration of the time limit, they may be fined no more than 50,000 yuan, the persons in charge directly responsible and the other directly responsible persons shall be imposed disciplinary sanctions.

Article 13 If the illegal activities of an operator are found to possess the following three conditions at the same time during price supervision and inspection, the competent price control departments under governments may order him to suspend the related business according to the provisions of Clause 3 of Article 34 of the Price Law:

(1) the circumstances of the illegal activities are complex and serious, which may be given comparatively severe punishment upon investigation;

(2) the illegal activities will continue if the related business is not suspended;

(3) the illegal activities may influence the confirmation of the illegal facts while other measures cannot guarantee a thorough investigation if the related business is not suspended.

When the competent price control departments under governments conduct price supervision and inspection, the law enforcement officials shall be no less than two, and they shall show their credentials to the operators or persons concerned.

Article 14 Operators causing consumers or other operators to pay more money because of their price-related unlawful practices shall be ordered to have it returned within the time limit; and they shall be ordered to look for consumers or operators who have over paid by publishing an announcement; the money that cannot be returned by the expiration of the time limit of the announcement shall be regarded and handled as illegal earnings.

Article 15 Operators falling under the conditions listed in Article 27 of the Administrative Penalty Law shall be punished lightly or given a lighter punishment according to law.

Under any one of the following circumstances, operators shall be punished with severity:

(1) the price-related unlawful practices are serious or have great social influence;

(2) they are found in violation provisions in every inspection;

(3) forging, altering, transferring or destroying proofs;

(4) transferring the capital or commodities related to the price-related unlawful practices;

(5) other price-related unlawful practices that shall be punished with severity.

Article 16 If an operator disagrees with the punishment decision made the competent price control department under government, he shall firstly make an application for administrative reconsideration according to law; if he disagrees with the administrative reconsideration decision, he may file a suit in the people's court.

Article 17 If a fine is not paid by the expiration of the time limit, an additional fine shall be imposed at a rate of 3% of the amount of the fine per day; if the illegal earnings is not paid by the expiration of the time limit, an additional fine shall be imposed at a rate of 0.2% of the amount of the illegal earnings per day.

Article 18 As for the units and individuals that commit price-related unlawful practices listed in these Provision, if the circumstances are serious and they refuse to make corrections, in addition to the punishments that shall be imposed upon them according to these Provisions, the competent price control departments under governments may make public their price-related unlawful practices at their business places until corrections are made.

Article 19 Price law enforcement officials disclosing State secrets or operators' commercial secrets, or abusing their powers, neglecting their duties, practicing favoritism for personal interests shall be investigated for criminal liabilities according to law if crimes are constituted; if no crimes are constituted, administrative sanctions shall be imposed upon them according to law.

Article 20 These Provisions take effect as of the date of promulgation.

COMMENTS OF THE BUREAU OF FAIR TRADE FOR IMPORTS AND EXPORTS OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA ON DETERMINATION AND TREATMENT OF MARKET ORIENTED ENTERPRISES, DATED JUNE 21, 2007

Comments of the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China on Determination and Treatment of Market Oriented Enterprises

June 25, 2007

On May 25, 2007, the U.S. Department of Commerce (DOC) gave notice in the *Federal Register* soliciting public comments on whether and how market economy treatment should be granted to individual respondent enterprises in antidumping proceedings involving China. In response to DOC's request, the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China (BOFT) hereby summits the following comments:

I. The U.S. Should Recognize China As a Market Economy.

The issue of China's market economy status in antidumping investigations involves the WTO principle of fair and non-discriminatory treatment in trade. It relates to whether China's exporting industries and related enterprises can compete as equals with the exporters of other countries, which are recognized by the United States as market economies, in a fair, equitable and

non-discriminatory environment. China has followed the U.S. legal and procedural requirements and submitted applications to the United States for market economy status and market-oriented industry status in a number of cases on a number of occasions. However, the United States has persistently refused China's application on various pretexts and fully ignored the evidence and facts that have been provided by China. Because the United States has persisted in designating China as a non-market economy country in its antidumping investigations, the result is that Chinese enterprises cannot and are not getting fair and non-discriminatory treatment in antidumping investigations.

Over more than 20 years of accelerating reforms in its economic system, China has established a market economy system. Such a market economy system has not only been written into the Chinese constitution, but is, in fact, a more developed market economy system that the system of some countries which the U.S. has actually recognized as market economies. In recent years, many other WTO Members have adjusted their designations of China's economic system to conform to present-day reality. A very good example is their modification of relevant antidumping policies towards China. Currently, many countries, including ASEAN member states, Australia, New Zealand, South Africa, Brazil, Argentina, Egypt and South Korea have formally granted China market economy status. Modifications made by these countries to their domestic antidumping rules show their active recognition of the achievements of China's reforms and market opening initiatives. This is based on fair and

objective evidence. We hope that the U.S. government can also objectively see the achievements that China has achieved in its reforms and in opening-up and becoming a true market economy.

II. Though The Current U.S. Request For Public Comments On The MOE Issue May Look Like Progress In Terms Recognition Of Chinas Movement Towards Being A Market Economy, In Reality It Is Little More Than A Formality And Is Insufficient To Address The Discrimination Of Current U.S. Policies.

The current U.S. request for comments on the issue of market economy treatment for individual respondents does not consider or solve the broader issue of market economy status for all of China's exporting industries or enterprises to the United States. Consequently, there is still a possibility that Chinese enterprises will be determined as non-market oriented enterprises and thus continue to be subject to unfair and arbitrary investigation rules, which will result in future U.S. antidumping investigations relating to China. Such an outcome is simply unacceptable to China.

The facts on which the United States based its determination in the CFS paper countervailing duty investigation clearly indicate that the United States should reevaluate and change its position on the issue of market economy status for China. Based on the United States, factual determination on China's overall economic development, we believe that if the United States continues to determine China to be a non-market economy and continues to adopt the traditional non-market economy investigation methodologies in its antidumping

investigations, there are serious legal and consistency problems with the U.S. position. Recognizing China's market economy status is the only correct practice that accords with the latest U.S. determination of the current situation of development of China as a market economy. As such, while the current U.S. request for public comments on the MOE issue looks like progress towards U.S. recognitions of China as a market economy, in reality it is little more than a formality to justify application of countervailing duties. This does not represent an objective and fair evaluation of the current status of market economics in China. The United States should recognize China as a market economy rather than merely consider the situation of market-oriented operations of individual respondent enterprises in antidumping cases.

III. If The U.S. Continues To Insist On Designating China As A Non-Market Economy, It Should At Least Recognize That All Chinese Industries Are Market-Oriented Industries And That The Burden Of Proof Should Be On Petitioning U.S. Industries To Demonstrate That A Particular Industry Or Company Is Not Market Oriented.

As admitted by the DOC in its recent findings on China's economic development, the progress of China towards a market economy has been accomplished in most sectors of the economy and with respect to most cost and prices. In the past 30 years, industries in most economic sectors have become market oriented as China has carried out its market-oriented reforms. Currently, enterprises produce, sell and price their products according to the rules of the market economy. There are no State restrictions on price or output. In particular, there is

significant competition among companies participating in of Sino-U.S. trade; industries exporting to the United States have grown into vibrant fast-growing industries with competition as the motivating factor. These are market-oriented industries.

What needs to be stressed is the fact that, while some companies in an industry are fully or partially state-owned, this does not mean that their operational and commercial activities are not market-oriented. In its past antidumping investigations, DOC has also made relevant determinations in this regard by granting separate rate status to these industries. In the cases of sewed cloth hats, spring washers, fireworks and silicon carbide, DOC has specifically determined that "State-owned", be it "owned by all people" or "collectively owned" does not represent "government owned." In U.S. antidumping cases against China in the past 10 years, DOC has admitted many times that China's State-owned enterprises are neither "de facto" nor "de jure" controlled by the government. As for the requirement that all major inputs to enterprises should be purchased at a market price, China is no different than most market economies. China suffers from the very same deficiencies as so-called market economy countries, which all regulate macroeconomic developments as does China. There is no basis to deny the status of market orientation to China's exporting industries on the pretext that the prices of the energy (power and coal) and main raw materials inputs by enterprise are controlled by the government. China does not intervene in these prices any more than do governments in countries that the U.S. considers market oriented. Market economy countries, including the United States, are no exception to selective interventions. Governments in market economies attempt

to influence price trends in the same what that China attempts to influence price trends. This practice is not unique to China and not unique to non-market economies.

In fact, BOFT believes, and the United States has tacitly recognized in its decision to apply countervailing duties to China, that the criteria applicable to determining whether an industry is market orient are too severe and result in many inconsistencies. As a result, the so-called MOI test is not a real test but nothing more than a formality. Virtually all of China's industries are already market-oriented industries. If the United States refuses to recognize China's market economy status, Chinese industries should also be fully entitled to the MOI treatment in antidumping investigations. One example is Canada, also a NAFTA member, which has adjusted its policies relating to the non-market economy issue, namely assuming that all Chinese industries are market-oriented industries in its antidumping investigations. Under this assumption, the burden of proof to demonstrate that an industry in China is not market oriented shifts to the petitioning party.

IV. When Considering The Issue Of MOE Treatment For Chinese Enterprises, The U.S. Should First Abandon The Assumption That Chinese Enterprises Are Controlled By The Government; All Chinese Enterprises Should Automatically Get MOE Treatment. And, The Burden Of Proof To Demonstrate Otherwise Should Be On The Petitioning Parties.

The recent U.S. determination to apply countervailing duties to China was largely based on the development of a market economy in China. This determination in the

CFS paper investigation requires DOC to abandon both the assumption that "Chinese enterprises are controlled by the government" which it has long adhered to in its antidumping investigations and the assumption that the government controls prices and input costs.

It is the view of BOFT that according to the latest U.S. evaluation of China's non-market economy status in the 2006 lined paper antidumping case, the assumption that "Chinese enterprises are controlled by the government" is completely wrong. Similarly, the fiction that Chinese prices and, therefore, costs are controlled by the government has not been established by any facts. In fact, the substance of the preliminary determination in the CFS paper countervailing duty investigation indicates exactly the opposite.

Meanwhile, the recent U.S. decision to apply countervailing duties to China has also weakened the foundation for the applicability of the non-market economy methodology to respondent Chinese enterprises. In its preliminary determination in the CFS paper investigation, the DOC itself pointed out that the Chinese economy is notably different from the Soviet economic model at issue in the Georgetown steel case in the 1980s and that there are no obstacles to the application of the countervailing duties to China under the current economic situation in China. DOC determined that subsidies exist in China, and subsidies are, by definition, distortions in market forces. If market forces do not determine economic behavior, then subsidies cannot distort this behavior. The DOC preliminary determination in the CFS paper investigation can only support a conclusion that the GOC intervenes only

selectively in the market, the necessary prerequisite for find a countervailable subsidy, and that except for such interventions a market economy prevails.

Based on the above, DOC should abandon its presumption that Chinese enterprises are controlled by the government and that prices are somehow determined by the government. All Chinese enterprises should automatically get MOE treatment. And, the burden of proof should be on petitioning U.S. industries to demonstrate otherwise.

V. Given Chinese Enterprises' Entitlement To MOE Status, The Discriminatory Separate Tax Rate Policy Against Chinese Enterprises Should Be Abolished. In This Regard, The Same Policies For Other Market Economies Should Also Be Applied To Chinese Enterprises.

BOFT believes that there are many irrational aspects in the separate tax rate policy ("county wide rate") which the U.S. currently applies to non-market economy countries. These are specifically reflected in the following:

1. The country wide rate policy is not an issue related to domestic price comparability, which allows a distinction in the treatment of respondents in non-market economies.

Regarding the treatment to enterprises of non-market economy countries in anti-dumping, Paragraph 1 of Article 6 of the 1994 GATT and Article 15 of *the Protocol on the Accession of the People's Republic of China* only permit differential treatment in circumstances where

for the problem is price comparability in non-market economy countries as compared to market economies. The core issue is whether China's domestic price or cost data can be used in antidumping investigations, but it does not involve the issue of whether Chinese exporting enterprises' export activities, including export price, are controlled by the Chinese government. Therefore, there is no justification to use a country-wide rate policy, in addition to the application of surrogate country prices, to determine the necessary remedy. After all, antidumping policies are to serve the purpose of remedy rather than punishment. Because there are no provisions allowing a country-wide rate either in the WTO Agreement or in the Protocol on China's Accession to the WTO, this is not an issue related to whether China is a market economy country or not. In fact, the U.S. only adopted the country-wide rate policy ten years after it had treated China as a non-market economy country. Given this, and considering that China is now a member of the WTO, the U.S. should grant China the same treatment as that granted to other WTO members rather than adopt differential treatment based on the pretext that China is a non-market economy.

2. The application of the country-wide rate does not comply with the provisions of the WTO Antidumping Agreement.

As for the application of the country-wide rate for exported goods by companies not selected for individual investigations and not qualifying for the "all others rate", Article 9.4 of the WTO Antidumping Agreement stipulates that the antidumping duty rate should not exceed the weighted average margin of dumping established with

regard to selected exporters or producers. In determining the weighted average dumping rate, based on WTO jurisprudence, WTO members shall eliminate zero margins and negative *(de minimis* margins) as specified in Paragraph 6.8 of the AD Agreement. The rates to be excluded under Paragraph 6.8 include not only margins based on total adverse facts available, but also margins based on partial facts available. Therefore, DOC must calculate the dumping margin for Chinese companies not selected for investigation on the basis of the calculated weighted average antidumping margin found for mandatory respondents, rather than following the current practice of first requiring Chinese enterprises to undergo the separate rate application process and granting the weighted average antidumping duty rate only to those that pass the application process. Moreover, when calculating the "all others" rate, DOC cannot eliminate only the zero and *de minimis* determinations from its calculation, but must also eliminate from its calculation any rates that are based on full or partial adverse facts available. Thus, the current U.S. policies regarding application of the country-wide rate and calculation of the "all others" rate are inconsistent with the WTO Antidumping Agreement.

3. Current DOC Policy is based on a presumption that is no longer applicable to the situation in China.

From the legal perspective, China has met the three U.S. criteria to qualify for application of the "all others" rate and there is no need for each enterprise to submit proof independently in each investigation. Moreover, in the furfuryl alcohol antidumping case against China in 1994,

DOC concluded, according to the Laws and regulations at the time, that China's exporting enterprises were legally independent of the Chinese government. As a matter of actual fact, most Chinese enterprises today have also fully met the criteria of being independent of and not controlled by the government. Indeed, the proliferation of DOC granting separate rate status to Chinese enterprises is recognition of this fact. Based on the two factors above, it is clear that most Chinese enterprises are independent of the Chinese government legally and in actuality. It follows that if the presumption of control and consequent application of a country-wide rate is not abolished, it should at least be changed to "When making exports, China's exporting enterprises are not controlled by the government either legally or in actuality, unless the petitioning party has sufficient evidence to demonstrate otherwise."

To sum up, while the U.S. policy of applying a country-wide rate is applied to non-market economy countries; it is in fact not a problem which is related to non-market economy status itself. It is not consistent with WTO rules, nor does it reflect the reality of the current situation in China. It is the view of BOFT that the policy should be abolished and that the United States should give fair treatment to Chinese enterprise in its investigations.

Bureau of Fair Trade for Imports and Exports

Ministry of Commerce

Peoples' Republic of China

June 21,2007

DOCUMENT FROM FILES OF WANG RENZHI OF NORTHEAST PHARMACEUTICAL GROUP CO., LTD.

On November 16, 2001, under the aegis of the China Chamber of Commerce of Medicine & Health Products Importers & Exporters, the four major companies from the domestic VC industry (Shijiazhuang Pharmaceutical, North China Pharmaceutical, Northeast Pharmaceutical and Jiangshan) sat down together to coordinate respective export quantities for the coming year. Analysis from persons within the industry was that the enterprises were able to sit down together at this particular time basically because VC prices had reached rock bottom, and no one could sustain a further slide; the next reason was, because the country had opened up the commercial products business, from a free competition aspect the enterprises were impelled and had no choice but to seek industry self-regulation. However the discussion process was extraordinarily difficult and because of the intense impact on profits, the discussion reached several impasses. After several stretches of silence lasting ten to twenty minutes, the companies finally reached a basic agreement.

On December 21, 2001, the China Chamber of Commerce of Medicine & Health Products Importers & Exporters again gathered these companies together to negotiate how to operate the agreement reached at the previous meeting, to ensure that each company would be able to fulfill its commitment. The Ministry of Foreign Trade and the Customs General Administration actively supported this effort to pre-verify and sign VC product types, requiring the companies file with the Chamber

of Commerce of Medicine and Health Products prior to export. The implementation of this system would result in orderly exports and stop the continued slide in the prices of VC. Company attitudes changed because of this. In the past they feared they would be unable to sell their goods and fought the pressure to lower prices by seeking to sell larger volumes, now export levels would be stable and the companies naturally wanted to sell for a good price.

On September 3, 2003, in view of recent VC export volume increases and price declines, and the U.S. trend toward increasingly draconian trading policies with respect to China, the Chamber of Commerce convened a "Policymakers Summit of the Vitamin C Branch Board of Directors." The meeting was chaired by the Western Medicine Division Chair Haili Qiao, and Chamber Vice President Changxin Zhang spoke. Director of the Ministry of Commerce Fair Trade Office Danyang Liu, Foreign Trade Minister Tie Wang, Chamber of Commerce Legal Affairs Division Officer Yun Ning, Western Medicine Division Vice Chair Gang Cao and others attended the meeting. U.S. attorney William E. Perry was also invited to the meeting to explain anti-dumping details relating to the United States and items of note for companies with respect to this issue.

On December 9, 2003, the Vitamin C branch of the Chamber of Commerce held a meeting in Shanghai to explore the issue of industry self-regulation, and Western Medicine Division Chair Haili Qiao attended the meeting.

On May 12, 2004, the Vitamin C Branch of the Chamber of Commerce held a meeting in Beijing. The

meeting split over the June production shutdown issue and was unable to come to a common understanding. Western Medicine Division Chair Haili Qiao attended the meeting.

In October 2004, the Board of Directors for the Vitamin C Branch of the Chamber of Commerce of Medicine & Health Products held a meeting, and the companies all believed that they should rely on the Chamber of Commerce's pre-verification and signature method, improve awareness of self-regulation, standardize business procedures, and strive to maintain export prices at reasonable price points of US$4 - $5/kilogram, to prevent the recurrence of the previous two price "avalanches." Haili Qiao stated that in fact earlier, at the end of the previous year, some domestic enterprises predicted that this year Vitamin C prices would fall as the result of expanded production, they studied and formulated a plan for a production shutdown, and that this method of implementation was good and relatively effective at suppressing the magnitude of the decline in prices.

WEEKLY WORK REPORT, DATED JUNE 30, 2006

Weekly Work Report (23rd Week)

June 30, 2006

First Export Department:

The Chinese VC manufacturers' conference held last week produced a certain effect on the marketplace, which stopped the continued fall of the market. This week, at the CPhI conference held in Shanghai, manufacturers have started to be cautious about their quotations or stopped to stop their quotations. We're actively gathering reactions from all the sides.

After the resumption of production of vitamin medicines by Weisheng, lots of products have been exported at a low price in an effort to reduce the stock; therefore there have been no shortages in the spot goods market so far.

In terms of VB1, Zhongjin Corp. of Tianjin is still not doing very well in their supply from the perspective of client reactions. There is still a sign of slight shortage of supply in the whole marketplace.

There has been some slackening in the sales of L-Carnitine.

Second Export Department:

VC and its series:

This week, under the instructions from the plant, we offered a quotation in a range of US$2.7 to $2.8 and there have been some small amounts of business, which have been concentrated in some special regions. There have been no significant movements in the Europe proper

while clients are still holding a wait-and-see attitude. There exists a certain stagnant period. There are a lot of rumours now flying around the market and quotations from Chinese VC manufacturers range from US$2.8 to $3 without any definite conclusion of transactions. Despite our efforts on finding out what is happening, we still haven't heard that there have been any deals made at US$3.

There are 55 tons currently sitting in the warehouse in Hamburg waiting to be picked up by clients.

VB1 and its series:

Long-term shortages in the marketplace has lured other plants to jump into the market and there are rumours that other groups may be entering into the market soon in order to cushion the supply shortages. Since our production has not been going particularly well, we have not made any attempts at quotations. There are no new higher prices coming out of Europe right now.

L-Carnitine and its series:

Small amounts and stable while competitors have more competitive bids. But the overall transactions remain low and it is hard to say that there will be more orders because of lower prices.

Third Export Department:

VC:

Since the news broken that Chinese VC manufacturers will set restrictions on the quantities of VC exports, the first reaction from the market has been that the downward pricing has been put under control. There are signs that the

market is recovering. However, instead of any real changes in the supply and demand, this round of price rise had a lot to do with human factor; therefore clients have begun to engage in a physiological face-off with manufacturers. Most of the clients are holding a wait-and-see attitude. Since users ultimately need to buy those products, some of the clients are slowly pricing at a range from US$2.7 to $2.8/Kg. We're prepared to raise our quotes to around US$3/Kg next week to see how the market reacts.

VB1:

We're facing severe supply shortages, causing many of the contracts to fail to be executed on time. This caused protestations from the clients. At present, some of the clients are demanding that we ship the good by air to ease the urgency. The airfreight above the normal price will have to be paid by the clients and they are also very indignant.

Fosfomycin:

Northeast Pharmaceutical Group Corp (NEPG) is falling behind other domestic manufacturers in fosfomycin sodium and fosfomycin calcium and our sales efforts are facing enormous difficulties.

Fourt Export Department:

1. Chloromyetin: There are many enquiries about quotation this week. Manufacturers at the CPhI conference were quoting US$29-/Kg, but the transaction prices have been lower. We sent a quote of US$28.50/Kg and the final transaction prices should be no less than US$28-/Kg.

2. Sulfapyridine: This week we signed a long-term contract with Auslin Corp. for 84 tons at the price of US$8.10/Kg and also set the price at more than US$8.20/Kg with some small clients.

3. Piracetan: After the registration of COS, manufacturers of piracetan preparation are registering our raw materials for piracetan. This week saw the peak of the registrations. It is estimated that there are more than 60 types of preparations that are produced from the raw materials of our plant. In addition, the general plant called a meeting regarding the market segmentation of piracetan of our plant, that is, to distinguish in the product analysis certificates and outer packaging. The measure will go into effect as of August 1.

Fifth Export Department:

1. There have been no firm offers for Zidovudine so far even though there are many enquiries. Quotations of US$370 to $380/Kg were sent without any contracts signed. It is learned from our client in Brazil that the Brazilian government is not having many tenders right now, and many of the requests are being made to the manufacturers for supplies by the companies that have already won the bids.

2. There are some quotations for Zidovudine in the country with a minimum price of RMB 3,000 Yuan /Kg (US$337/Kg). Other foreign clients are selling Zidovudine at US$355/Kg CIF airfreight.

3. There are many Zidovudine manufacturers popping up recently in Zhejiang and Jiangsu provinces. It is expected that the market price for Zidovudine will substantially tumble when these manufacturers are coming into operation in September or October.

4. There is one enquiry about 650Kg Zidovudine from ELAF Corp. and we sent out a quote of US$216/Kg. We are currently waiting for the final reply from the client.

5. Pyrantel is in a shortage in the market right now but the price is not rising very fast. Some of the regular clients are still buying Pyrantel at the same price of RMB 1,100-1,200 Yuan/Kg. But the quotes in the market have reached RMB 1,400 Yuan/Kg. And even at this price there is no guarantee that the goods are available unless the buyer is a regular client.

6. Since Nippon Corp. found at the Shanghai CPHI conference that a foreign trade firm from Shenyang is underselling Amantadine Hydrochoride (regular price for export Amantadine Hydrochoride at US$20/Kg), causing the company to ask our company for a lower export price for Amandadine Hydrochoride. After several rounds of negotiations, the client finally came to terms with the quote of US$50/Kg.

Import Department:

1. Epichlorohydrin

   The domestic has not been affected by anti-dumping sanctions and the operations of Tianhua plant, with pricing still ranging from RMB 24,500-25,000 Yuan/ton. There are nearly 300 tons of stocks in our plant and we still have the time to wait for further information from the market.

2. 1,4-Butanediol

   Since the BASF plant in Malaysia has run into troubles, there is correspondingly supply crunch. After one week of efforts at coordination, 100 tons can be supplied from the German headquarters in August, 32 tons from BASF Ulsan plant in Korea in July, 32 tons from Japan BASF at the end of July, in addition, there is a stock of 75 tons, the Production And Technology Department and Planning Department have been notified to secure small amounts from within the country for replenishment.

3. Pyridine

   The domestic market is brewing with price increases with foreign quotes from Pyridine at US$5.8-6/Kg. If there are new orders from our plant, foreign manufacturers will be able to supply goods around the end of August and the prices will be much higher than the price of the previous shipments at $US4.85/Kg.

4. Propargylalcohol

   30 tons of such goods were ordered with BASF. It is expected to arrive at the plant at the end of August since they will be shipped from Germany in mid-July.

5. Metal Magnetic Detectors

   Since our letter of credit has been issued already, the Japanese supplier agreed to make efforts to deliver the goods at the end of July or early August.

DOCUMENT TITLED "2006 VC AND PRODUCT LINES AMERICAN MARKETING AND SALES STRATEGY"

Strategic background:

In 2005 the global VC industry underwent a rapid strategic shift in capital and technology, investment mergers and acquisitions continued to increase and hot markets continued to emerge. In the face of intense pressure, both challenges and opportunities were present for China's VC enterprises.

1. **China's VC enterprise operating costs greatly increased**

   At the start of 2005, after VC prices exploded and theoretically recovered, there continued to be low-price confusion in the marketplace. Prices at $3/kg could not be maintained for long, and such factors as explosive increases in world oil prices, tightened supplies of domestic gas and electricity, the pressure to increase the value of the *renminbi*, international organizations forcing certification, state environmental protection inspections to meet standards, increased costs and reduced profits for various items followed one after the other.

2. **Severe surpluses in global VC production capacity**

   At the beginning of 2005, China completed work to achieve 100,000 tons of VC production capacity; added to DSM and BASF's 32,000 ton production capacity, with a situation in which

global VC consumption levels had increased to 100,000 tons, there was still a surplus of almost 30,000. Thus in 2005 factors that sustained low-price position operating results for VC were forced by high operating costs to stop production.

3. U.S. company antitrust suit filed

In 2005 an antitrust suit was filed in the U.S. against China's VC enterprises using "price collusion and monopoly" as cause. This is the first lethal antitrust lawsuit encountered by domestic enterprises and it could possibly drag on for a long time at enormous cost that could result in our VC enterprises closing their doors and shutting down. Correctly dealing with the lawsuit and minimizing losses to the lowest level possible will be a major test of the courage and intelligence of China's VC enterprises.

4. The two largest VC [manufacturers] in the world rapidly shifted capital to China

On May 12, 2005, DSM announced that it was pursuing a vitamin industry consolidation strategy, concentrating the vitamin C shift to England's Dalry plant for manufacturing. In the third quarter it closed a 15,000-ton VC raw materials plant in New Jersey in the United States. In November 2005, DS11 purchased North China Pharmaceutical shares for US$164 million in cash and share participation in the North China Pharmaceutical Company, forming two new joint venture companies chiefly doing business in vitamins and antibiotics with DSM

to hold 49% of shares in each. This major step was both disastrous and fortunate for other VC enterprises and the results were soon evident. Prior to this, BASF China's wholly owned VC compart had signed a contract to settle in Shenyang. At a size of 18,000 tons, it was. mainly engaged in additional processing of VC products. BASF immediately closed its 400 -ton VC manufacturing plant in Denmark.

5. **In 2005 China's VC exports again reached historic highs**

China Customs statistics for January to November 2005 totaled 70,441 tons in exports, an average of 6400 tons exported per month. Total annual exports were expected to be about 7700 [sic] tons, some 10,000 tons greater than 2004 export volume of 67,852 tons. It was the most rapid single-year increase in exports. Of these, the greatest volume increase in exports to the United States was with Welcome - a relative increase of 117% - next was Jiangshan with an increase of 32%, Weisheng with 20%, Northeast Pharmaceutical fell 10% and Hualong had a self-reported business exports increase of 138% for all ports.

In the face of a complex, diverse VC market, people were forced raging into a merger and acquisition trend. We must re-consider and conscientiously analyze to adjust our thinking and formulate feasible sales proposals.

One. Analysis of current competition

(One) Analysis of competitors

1. DSM/Hebei Welcome Pharmaceutical Company: Welcome currently has VC production capacity of 20,000 tons and DSM's manufacturing plant in England has a production capacity of 1.8 [sic] tons. By working with DSM, the support of DSM's global sales network and its one-step direct connection method to advance VC production technology and Roche's experience with mature production of high value added VC products, North China Pharmaceutical suddenly had a position on the vitamin market. DSM did not necessarily expect more than 20,000 tons, but DSM certainly won't use a "price strategy" method to plunder the market. Its method of cooperating with other domestic VC enterprises will also be a breakthrough and in the next 2-3 years more major changes will take place in the global VC model.

2. Weisheng Pharmaceutical: Current VC production capacity has a surplus of 30,000 tons, and it is an important cooperative partner with Coca-Cola and other renowned world companies. Early in 1998 the company established a VC processing workroom with annual capacity of 2,000 tons, producing VC sodium and VC calcium. In June 2004 a 20,000-ton VC engineering project was completed and production capacity pushed to an increase of 30,000 tons. In July 2004 a 7000 tons/year VC deep-processing project broke ground and in October 2005 the project went smoothly into production. VC sodium, VC calcium, coated VC, VC pills and 29 other product types were launched. Some of the products have had success with DSM and BASF high-end consumer groups. From December 19 to 22, 2005, the Coca-Cola Company designated third-party

entity NFPA DAFE to perform a four day, on-site quality inspection and received a high assessment Prior to this, Weisheng Pharmaceutical's manufacturing easily passed the related social responsibility inspection.

In 2005 another bright spot light for the company was the improved "VC expert" market position and advanced vitamin formulation for the domestic market - building an empire with "Guo Wei Kang" as its first vitamin product.

3. Jiangshan Pharmaceutical: In 2005 VC production capacity was 20,000 tons and main exports were VC derivatives and pills. It has a good reputation on the international market, through complete sales networks established by Helm and AMC sales reps in the European and U.S. markets. However because VC product prices have been low recently, distributor profits were limited, and although Jiangshan Pharmaceutical mainly sells high value added products business profit margins were not as expected and in 2005 the company parted ways in its cooperation with U.S. representative AMC. From the attached Jiangsban Pharmaceutical VC product catalog, it is not hard to appreciate its unique competitive power. See attached Table 1.

4. Shandong Zibo Hualong Company Ltd.: It is the only domestic private VC company. VC raw materials are its dominant product and annual production capacity is over 10, 000 tons. The company has its own electrical plant, wastewater processing plant and coal mine. For VC, it employs a two-step advanced fermentation technology, introducing the U.S. Katama Company three-part evaporation device, air pressure machine and the Belgian VC sodium centrifuge. Its product quality has approval from major European and U.S. users. Because

the company has always been able to get local government support, the company has relative superiority in termils of work force and industrial raw materials prices, and people within the industry universally believe that it has room to grow. On the international market, it performs using a flexible pricing mechanism, being highly competitive and rapidly expanding, and the company continuously performs well at international exhibitions. In 2005 VC export volume was more than two times that of the previous year and it has started making advances in the areas of VC sodium and its derivatives.

5. Anhui Tiger Biotech Company: A Chinese and foreign joint investment enterprise, annual export of various types of VC products is about 5000 tons. Main products are raw VC powder, VC phospharte (35%, 25%), coated VC (90%, 93%) and VC magnesium phosphate. Its VC phosphate export volume is number one nationwide. The company is particularly concerned with VC product requirements for the feed industry, the food products industry and the cosmetics industry.

(Two) Target market analysis

China's Vitamin C mainly is sold to the United States and the European Union. Of China's vitamin exports, U.S. demand comprises about 30 percent and the European Union about 40 percent In 2005 import volumes for the ten largest nations in order were: the United States, Germany, Japan, Belgium, Holland, England, Brazil, Spain, Korea and Italy. See attached Table 2 for January to October 2005 China Customs VC product national sales statistics.

From China Customs statistical data it is not hard to see that the United States and Germany are the largest

importers of China's vitamin C and the largest consumer regions for vitamin C worldwide. As China expands into doing business overseas, Germany's market position weakens in terms of its role as gatherer and distributor of pharmaceutical raw materials worldwide. Global business is moving toward direct connections and easy growth, so although other countries may import small basic quantities of VC from China, the numbers are increasing. Thus Northeast Pharmaceutical's VC is important in Canada, Argentina, Brazil, Columbia, Mexico, Chile and Peru.

(Three) Advantages of Northeast Pharmaceutical's VC:

1. Compared to other enterprises, Northeast Pharmaceutical's VC entered the international market at an earlier time and its market "recognition rate" is high, thus it has a certain power on the international VC market. It has larger, faster, and more direct expansion of market opportunities.

2. Sufficient use of opportunities to cooperate with BASF. This is a business opportunity incomparable to that of any other enterprise.

3. Northeast Pharmaceutical exports numerous types of products and is better able to use "bundling" business opportunities with common regular customers and such products as VB1, L-camitine, amino acids, etc. The overall superiority of the many BASF Group products has turned into an excellent opportunity for us to be victorious.

(Four) Disadvantages of Northeast Pharmaceutical's VC:

1. Incomplete standard VC and similar product lines, only one standard powder and distribution is not regular. Granular size control is poor and there is too much fine powder.

2. The VC line of products has no competitive superiority in terms of cost. For example, VC sodium and VC calcium.

3. Quality incidents happen frequently and explanation is that production is not sufficiently stable. In the near term, quality issues have arisen and have already created strong customer reactions to such issues as clumping, color changes, foreign objects and damaged packaging; all of which have greatly constrained our VC export foreign exchange. If this persists long term, then the market share we developed and created will quickly narrow. Quality is vital.

4. VC hardware and facilities await further improvement, the quality control room and the VC production site elicited concern to the inspector's first impression and our VC sodium site and quality control room aren't ready to be seen.

5. Market competition is cruel and VC is already not an ordinary commercial product. It has become a necessary product for people, so prices are very sensitive. Northeast Pharmaceuticals' current VC costs need further reductions to benefit from market competition.

6. Document registration and customer service are not prompt and there still exists a gap with product quality audit results and customer demand, and this affects export orders.

(Five) Northeast Pharmaceuticals VC market opportunity:

1. Under strong pressure from China's VC enterprises, BASF's Japanese plant and DSM's Scottish plant were forced to withdraw from the market and die a natural death. The world's VC market supply and demand relationship is quickly moving toward equilibrium, and prices will return to reasonable levels and move quickly toward stability.
2. Looking at the future potential of the Asian and Latin American VC markets, global VC consumption levels will grow at a steady pace.
3. In 2005 the avian flu virus appeared at various locations worldwide and the medical/pharmaceutical industry, the food products industry as well as the feed industry placed an intense degree of emphasis on VC.

Two 2006 VC sales market targets in America

Under the guidance of President Dong's strategy of "producing great formulas and producing precision raw material pharmaceuticals," the 2006 VC export target for the American marketplace was 10,000 tons. The VC line of products would strive to achieve 2000 tons. High value added VC product lines made with precision and strength have established a market position for Northeast Pharmaceutical's VC and product lines.

Three. 2006 sales market strategies in the Americas

1. Continued emphasis on cooperation with the BASF sales alliance and the progress of "Sinocization" in the VC industry have truly created a "strong alliance" for "mutual benefit." To the greatest extent possible, we will strive to make BASF VC global purchasing orders reach 5000 tons through expert management, priority preparation and complete follow-through service.

2. Today as international trading pressures continually increase, flexible operations in compliance with conventional methods of international business, actively expanding markets in the Americas, especially sales price quotes, marketing and information exchange in the United States, that is, must avoid strategies that would appear counter to sales growth and thus speak no further about the antitrust lawsuit

3. In 2006 global VC production basically completed the shift to China and VC enterprise VC sales internationalization was also complete. Because of this cultivation it created a precise and strong benefit for solidifying the sales team and was critical to Northeast Pharmaceutical's "VC defense battle."

4. China's VC enterprise manufacturing was established on a low-cost, large-scale basis, and in addition to a number of unstable factors, export prices have been an important indicator of the market's initial shape, determining the enterprises' survival and development. Production volume and inventory furthermore are a measure of the equilibrium of the supply and demand relationship, and because of this price, production output and inventory are of necessity special concern to us every minute of every hour.

5. Production periods, delivery times, overall planning and deployment of export orders, control of production costs, optimized resource use, realization of maximum enterprise profit, sustaining production continuity and pursuit of the optimal economic model - to improve the overall might of Northeast Pharmaceuticals.

6. Strengthen self-regulation in the VC industry, but don't rely completely on the "gentlemen's agreements" of the Chamber of Commerce.

7. Change the market development strength of the VC line of product types, reduce costs, improve quality, optimize investment, focus on actual performance, and improve our factory's overall competitiveness. "It is preferential to abandon new product research and absolutely not lose market advantage." In the face of the recent BASF wholly owned investment company, our first priority must be projects that require low investment and produce fast results. "Fighting to be first is step one, lagging behind a half step is a mental burden." To construct a product sales group for the specialized VC line of products, with specialists in charge, to carry out a series of individual products and establish client contacts one by one, it is necessary to formulate a time table with requirements and quantitative norms to be reached at each stage.

8. Improve network construction, support clients with emphasis on the U.S. market, like PIL, ACT, Westco, Eastwest, Leiner, Anmar, Suzhou, UFI, etc. In order to prevent and spread around operating risks, establish a past due warning system for capital, continuing to move forward, to protect against misfortune and misspent effort.

9. Thoroughly study VC market trends, accurately grasp the pulse of the market, formulate feasible pricing strategy, get large orders and major customers, and focus on our factory's technology level and user demand to get "what is there and what isn't there."

10. Every country is a target market. Use export data from China Customs to analyze competitors' market share, competitive strength and relative market capacity, then quantify our export product types and the chief direction in which our efforts take us. Taking the United States as an example, in July and August 2005, Weisheng and Welcome expanded their VC export volume to the U.S. The explanation is that DSM closed its New Jersey VC factory plant and this was the result of said release on market performance. In 2005 BASF purchased less VC from our plant, package style and delivery ports were different; predicting that the superiority of the BASF VC line of products is weakening and in terms of BASF market pressure, there is room for competition in China's Jiangshan and Weisheng VC product lines. For details, see Table 4.

These are not ordinary questions. In 2006 Northeast Pharmaceutical will face even more grim market concerns, but we believe that we have the ability to win in the "VC defense battle."

Friday, December 30, 2005

Table 4. Users and Distributors of VC and Similar Product Lines in the United States

No.	Company name	Sales range and purchasing orientation	2006 targets and steps to take
1	DSM	The largest manufacturer and distributor of VC and product lines in the United States. Its networks are complete, it is strong, it is highly knowledgeable about the market, and after purchasing stock in Northeast China Pharmaceuticals, in the second half of 2005 large quantities of VC were purchased from Northeast China Pharmaceuticals. The two are linked strategically and have even more solidified DSM's hegemony over global VC	Watch closely to understand its general trends

2	**BASF**	Its sales networks radiate throughout the entire American continent, it has about 5000 tons in annual VC purchasing agreements with our factory. It is strongly competitive in the market for the VC line of products.	Improve cooperation, strive to get all VC orders.
3	**WATSON**	Famous U.S. food additive supplier that purchases 400-500 tons of VC and products from China annually. Starting in 2004 our factory began to wrest control of their purchasing orders from Welcome.	Improve communication, urge the completion of contract renewals and secure transfer of funds.

4	**AMC**	Famous U.S. seller of VC and products. VC is purchased mainly from Weisheng and product lines are contractor sales from Jiangshan on the U.S. market, but company controlling stock is held by PIL. .	Watch closely, improve exchange of information.
5	**PIL**	Famous U.S. distributor of food additives, it mainly sells our company's VC and related products. 2004 imported over 2800 tons from our plant and in 2005 imported 2300 tons of VC and related products.	Improve overall cooperation, get back share stolen by developing market.
6	**UNIVER**	U.S. agent of Shijiazhuang Weisheng Pharmaceutical Company	Watch closely.

7	**HELM NEWYORK**	Chiefly sells Jiangshan and Weisheng VC and related product lines, has indirectly purchased 1-2 containers from our plant.	Actively strive to get orders.
8	**COCA-COLA**	Famous global beverage company. The U.S. concentrate plant and juice plant purchase large quantities of standard VC powder from China, but their granular size demands are mainly for the purchase of 500 kilograms bags of VC powder, and in addition to this Jiangshan, Northeast Pharmaceutical and other plants don't have equivalent supplies.	Improve our plant's VC product quality, strive to get even more concentrate plants to approve our plant's VC.

9	**NBTY**	Nutritional and food products company that purchases Chinese VC products from different channels each year. Quality requirements are quite high.	Improve DC-level product quality to strive, increase order quantity.
10	**LERINER**	Largest U.S. user of DC97, OCT production plant, purchased from Jiangshan, Weisheng and Northeast Pharmaceutical. In 2004 and 2005 signed contracts to purchase 300 tons and 500 tons, respectively, from our factory.	Expand cooperation, control risk, strive to get 2006 orders.

11	**PERRIGO**	Second largest user of DC97 in the U.S.; its quality standard demands are quite high and it is a loyal customer of BASF and Jiangshan. Currently our factory's samples have not received final approval.	Control DC97 granular size, improve color saturation, improve product stability.
12	**SUZHOU-CHEM**	Mainly sells Northeast Pharmaceutical's VC, starting in 2004 signed purchasing contracts with our plant for 400 tons of VC per year.	Improve cooperation. Shared service improvements to final user.
13	**ALCHEM**	Retailer in the western United States. Signed large order for VC from our plant in 2004.	Strive to get order in 2006.

14	**ACT**	U.S. East Coast sales territory, represents our plant's deliveries of VC to P&G and Nestle.	Strive to get 2006 orders from P&G and Nestle.
15	**UFI/GE**	Famous U.S. distributor of VC, mainly sells Weisheng and Welcome VC. In 2004 was an important VC cooperative partner with our plant.	Improve cooperation, share expanded marketplace.
16	**EASTWEST**	Important VC and related product retailer on the U.S. West Coast. Each month purchases 2-3 containers of VC or DC97 from our plant.	Maintain stable and healthy relationship. Build our plant's DC97 market.
17	**ANMAR**	Main business is our plant's DC97 products. In 2004 and 2005 signed contracts for 150 tons.	Active support, expanded sales volume.

18	**AMERICAN INGREDIENTS**	2004 to 2005 working bard With PIL Company to sign a purchasing contract with our plant for 300 tons of VC.	Strive for 2006 purchase order.
19	**E.M. SERGENT**	Previously an important customer of our plant, now selling Weisheng DC97 products.	Work to make a contact, renew cooperation.
20	**VANTAGE**	U.S. West Coast DC95 and DC97 distributor	Co-development of DC95.

MEMORANDUM OF NOVEMBER 3, 2002 MEETING OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS, WRITTEN BY WANG QI OF JIANGSU JIANGSHAN PHARMACEUTICAL CO., DATED NOVEMBER 5, 2002

On November 3, 2002, the VC Branch of China Chamber of Commerce for Import and Export of Medicines and Health Products held a meeting in Panjayun, Beijing, to discuss the current market conditions of VC products and the countermeasures the Chinese VC manufacturers will take. The following entities and individuals participated in the meeting:

CCCMHPIE:	President Feng, Qiao Hai, Wan Ning
Northeast GPF:	Chen Gang, Du Chengxiang, Wang Renzhi
Jiangshan:	Kong Tai, Wang Qi
Weisheng:	Feng Zhenying, Yu Tao, Wang Yaguang, Jiang Zhanxu, Guo Guoping
Welcome:	Huang Pinqi, Zhang Yingren

Key points of the meeting and messages are recorded as follows:

1. Market Information and Exchange of Views of the Current Situation

- Roche's plant in Scotland reduced output starting from September, in order to prepare for equipment upgrade that will result in an 8,000-tons increase of production capacity in the plant. It is expected the upgrade will by completed by January of next year, and the plant then will have an annual capacity for 23,000 tons.

- Chen Gang said that Northeast GPF signed an agreement with BASF this year to supply 350 tons/month at $ 3.26/kg, and the destination was the United States. Because of this agreement, BASF halted production in its plant in the United States in June, but has been keeping its granule VC production. Since the price of VC has been increasing rapidly during the second half of this year, BASF agreed to raise price by $0.10/kg at the request of Northeast GPF.

  BASF visited Northeast GPF recently to negotiate purchase agreement for the next year. Northeast GPF asked for $4.50/kg, whereas BASF offered $3.80/kg, threatening to resume production at its North Carolina plant if Northeast asks more than $3.80/kg. BASF will visit Northeast GPF again to further the negotiation on November 20.

- General Manager Kong of our company reported at our meeting that Roche had inquired our company about the possibility of providing 6,000 tons of VC and was declined. General Manager of Weisheng said they had also received the same inquiry from Roche. Welcome did not receive such inquiry.

- I learned from an exchange with Du Chenxiang of Northeast GPF on the sidelines that Northeast has done pretty well this year with DC export (more than 500 tons) but the sales now stagnated when the price reached $4.70/kg; the export of Na has been all right (no figures provided), but the export of Ca rather poor with a very small amount.
- I learned from an exchange with Wang Yaguang of Weisheng on the sidelines that Weisbeng's DC export has exceeded 500 tons this year.

2. Quantity

Between January and September, Chinese VC export is 31 ,669 tons (according to statistics of CCCMHPIE), or 32,300 tons (according to statistics by Customs), and of which according to the statistics of the Business Association:

	Self-operated export	Total
Northeast GPF	9,652 tons	9,668.8 tons
Jiangshan	7,465.15 tons	7,567.7 tons
Weisheng	6,273.227 tons	7,578.43 tons
Welcome	4,922 tons	5,996.775 tons

Adjustment: Each manufacturer would be given an extra quota of 1,000 tons for this year, and the total production will be 43,000 tons for the year, but we are asked to tell outsiders that the total production in 2002 is no more than 40,000 tons. Volume for each manufacturer after the adjustment is as follows:

	Quota for November (Including adjustment)	Yearly Total
Northeast GPF	1,644 tons	13,500 tons
Jiangshan	1,294 tons	10,500 tons
Weisheng	1,124 tons	10,000 tons
Welcome	1,298 tons	9,000 tons

3. Pricing

   No consensus was reached about price at the meeting. The minimum price for export remains unchanged. Each company can provide price quote based on its own judgment, and no specific restraint or requirement is imposed.

4. Next VC Branch meeting is scheduled for January next year, and date and location of which are to be decided. At that time, Jiangshan will have taken up the position of the Chairman of the Council.

Written by: Wang Qi November 5, 2002

NOTICE OF THE CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS REGARDING PUBLISHING THE INDUSTRY AGREED EXPORT PRICES FOR THE KEY COMMODITIES FOR THE SPRING OF 2003

China Chamber of Commerce for Import and Export of Medicines and Health Products

(2003) *Yi Shang Zi* No. 31

Notice regarding publishing the industry agreed export prices for the key commodities for the spring of 2003

To relevant member enterprises:

Pursuant to the opinions of the major enterprises, the industry agreed export prices for the key commodities in the western medicine category have been revised. Now, the new price list has been printed and distributed to you. Please abide by the list in implementation. Please pay attention to the following when carrying out the list:

1. The agreed prices are the minimum prices. We put the limit on the floor prices but not the ceiling prices;

2. When the price term in a contract is not in accordance with the agreed price term, one shall voluntarily convert the price term to be consistent with the agreed price term, so as to facilitate the application for the export license and customs clearance.

3. The agreed price of Saccharin sodium shall take effect on Apr 1, 2003, and the agreed prices for other commodities shall take effect on Apr 15, 2003.

Confidential

List of export prices of commodities reviewed by Customs and agreed by the industry for obtaining an export pre-authorization stamp from the chamber, for Apr. 2004

Name of the product	Commodity Code	Agreed price (USD)	Unit	Price Term
Vitamin C	29362700		KG	CIF
Paracetamol	29242920	1.9	KG	FOB
Saccharin Sodium	29251100	2.8	KG	FOB
		2.85	KG	CIF India
		2.83	KG	CIF Asia
		2.88	KG	CIF Europe, South America
		2.92	KG	CIF US

Seal of China Chamber of Commerce for Import and Export of Medicines and Health Products

List of industry agreed export prices of Heparin Sodium, Penicillin

Industrial Salt, and Tetracycline Hydrochloride for Apr 2003

Name of the product	Commodity Code	Agreed price (USD)	Unit	Price Term
Heparin Sodium	30019010	600.00	KG	FOB
Penicillin Industrial Salt	29411099	10.00	1 bn *(translator's note: the original is not very clear.)*	FOB
Tetracycline Hydrochloride	29413012	11.00	KG	FOB

Seal of China Chamber of Commerce for Import and Export of Medicines and Health Products

MEMORANDUM OF MAY 28, 2004 INTERIM MEETING OF THE VITAMIN C SUBCOMMITTEE, DATED MAY 28, 2004

Interim Meeting
May 28, 2004

MEMORANDUM

Date: May 28, 2004

Place: Main Conference Room, 3rd fl., Main Office

Presiding: Kong Tai

Present: Li Weiwen, Huang Songhu, Zhang Yajun, Wu Youfa, Xi Chuanlin, Wang Puhuai, Hua Juping, Ma Yiping, Wang Jian, Liu Qixun, Yuan Xun, Chou Wenguang, Wang Yongbin, Huang Jianmin, Lu Wei, Bao Kede, Mao Jianping, Xia Xudong, Zhu Tao, Wang Qiling, Dai Suxiang, Shao Hongwei, Ge Liang, Dai Yuqi, Wu Yuansheng, Xue Bingnan, Zhu Peixi, Tao Zequn, Xu Xinhui, Yang Canjun

Absent: Xu Jianming (on assignment)

Record Keeper: Shi Yaru

Managing Director Kong:

1. Cancellation of Plans for Production Stoppage in June

Four domestic ascorbic acid manufacturers (Shijiazhuang Vitamins, Hebei Welcome Pharmaceuticals, Northeast General Pharmaceuticals and Jiangshan Pharmaceuticals) reached a production stoppage

agreement last year. They planned to stockpile in Shanghai warehouses 150 tons of product each month from January through May and then in June to stop production to overhaul equipment. However, there was a change in circumstances. Shijiazhuang Vitamins unilaterally tore up the agreement. The four companies held a meeting on May 12 in Beijing to coordinate the production stoppage but Shijiazhuang, using the pretext of conducting a trial run, announced it was only stopping the old production line and that the new 15,000-ton production line, where on May 8 a trial run had been formally launched, would not be included in the production stoppage plan. As a result, the agreement fell apart and plans for ceasing production in June were canceled.

On May 24 the responsible officials from Hebei Welcome, Northeast General and Jiangshan held talks in Nanjing and reached an agreement that they would stop production at an appropriate time in the second half of the year, the length of the stoppage to be determined by further discussions among the three companies. Whether or not it would possible to stop production in the latter half of the year depended on Shijiazhuang's behavior.

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MEMORANDUM OF MAY 19, 2005 MEETING OF THE VITAMIN C SUBCOMMITTEE, DRAFTED BY WANG QI OF JIANGSU JIANGSHAN PHARMACEUTICAL CO., DATED MAY 22, 2005

From: Wang Qi [wq@aland.com.cn]

Sent: Sunday, May 22, 2005 7:53 AM

To: Tai Kong; Wang Cheng; wangqiang

Subject: JJPC0033645-VC Chamber of Commerce Meeting Memo

Attachments: JJPC0033547_

GM Kong, GM Wang, Wang Qiang (Assistant to GM),

Greetings!

Please see attached for your reference. Please contact me should there be any unaddressed issue.

Best regards,
Wang Qi

Yourlogo, Inc. Insert a catchy tag line here

Wong Qi Jiangsu Jiangshan Pharmaceutical Co.

Manager of Imp. & Exp. Div. No. 20 Jiangshan Road,
Jingjiang, Jiangsu
P.R. China 214500
tel: +86 512 68244598
fax: +86 512 68249548

wq@aland.com.cn mobile: 13701439933;13382189783

VC Chapter of the Chamber of Commerce Dalian Meeting Memo

Time: May 19 2005

Place: Dalian

Attendees: The Chamber- Qiao Haili, Wan Ning

Northeast GPF- Zhang Lianke (Vice Economist General), Wang Renzhi

Weisheng- Feng Zhenying, Wang Yaguang,

Welcome- Huang Pinqi, Zhang Yingren, Manager Tang (female)

Hualong- Manager Liu

jiangshan- GM Kong, Wang Qi

1. Market information exchange:

Huang Pinqi: The export quantity for 1Q was 20,000 tons, among which, the March export was 7,900 tons. Based on this trend, the total export volume from China for this year will exceed 80,000 tons;

Qiao Haili: As the price is gradually decreasing, he hopes that each manufacturer will take the possibility of anti-dumping highly seriously.

Wang Renzhi: The situation for this year is different from that of 2003. The newly added production capacity has already far surpassed the production capacity that DSM is supposed to decrease. Judging by the relationship of supply vs. demand, the price will continue to decrease. At present, the floor rate of Northeast GPF is USD3.40/

kg. From the point of view of its new leadership, they would store the product as inventory, rather than sell if the price is lower than the cost (cost: USD3.40/kg?). Its current inventory is below 1,000 tons;

Manager Liu of Hualong: The cost of Hualong currently is between RMB 27,000 - 28,000/tons. They expect that after the completion of the power plant, the cost may be reduced to USD2.70-2.80/kg (calculated value in theory);

GM Feng: He hopes that steps will be taken to stabilize the price properly, such as each manufacturer reducing its production volume proportionally?

GM Kong: 1) He does not agree the proposal of proportionally decreasing production by each manufacturer, because, the decrease of price in the market was caused by the increase of production by several factories; Jiangshan's production volume is still 15,000 tons and did not increase production volume per se. Therefore, it will not participate in this production reduction;

2) If the price continues to decrease and this may trigger anti-dumping (*investigation, translator's note*), then we all will be finished;

3) The total demand of the market is fairly stable. It will not bring new demand because of the price decrease. He hopes that everyone uses more senses, rather than simply cutting down the price. Can each manufacturer control its production volume appropriately?

2. Proposals made as a conclusion by Huang Pinqi:

1) Using the current prices for obtaining the export pre-authorization stamp as the floor prices to export VC for each manufacturer;

2) During July and Aug., each manufacturer will stop fermentation for about 20 days so as to reduce the production volume appropriately and ultimately relieve the situation that supply surpasses demand;

Weisheng/Welcome/Jiangshan expressed that it principally agreed to the proposals; Northeast GPF/Hualong will bring the proposal back and have its company leadership make the decision. As to the details on how to execute the proposals, manufacturers will decide when they meet again in June at the Shanghai CPHI event.

3. Explanations:

I have the following two explanations based on my observations of the meeting:

1) Both Weisheng and Welcome are very inclined to the idea of production shutdown/production limitation. It may signify that these two manufacturers are currently under the pressure of high inventories and that the current price level has made it very hard for them; (information that we got before the meeting echoes that they have high inventories.)

2) As for the proposal for production shutdown/limitation, each manufacturer will as usual have its own calculations. In addition, due to the damage to the agreement caused by Weisheng last year, it is still an open question as to what extent the consensus made at the meeting will be implemented. We should have a sober estimate of the situation.

Draft: Wang Qi May 22, 2005 Sunday

Copy to: GM Kong, GM Wang, Wang Qiang (Assistant to GM)

IMPORT/EXPORT DEPARTMENT JUNE WORK SUMMARY, DATED JULY 6, 2003

I. EXPORT

REDACTED

4. Market Situation:

June market price kept on rapidly falling, from the beginning of the month 9.00 USD/kg, dropped to 7.00 USD/kg at the end of the month. Among domestic manufacturers, Wei Sheng and Welcome headed the fall.

5. Chamber of Commerce Meeting:

On the 11th of this month, our company organized a meeting on market analysis among the six domestic manufacturers and the China Chamber of Commerce of Medicines & Health Products in Qing Dao. We all agreed to set the floor price at 9.20 USD/kg, hoping to slow down the speed of market price falling, also hoping to strengthen the confidence of middle suppliers and consumers. Looking at the effect a couple of weeks later of this month, the effect of this price limitation is very limited, every manufacturer quoted prices lower than the floor price.

REDACTED

Import/Export Subsidiary: Wang Qi July 6th, 2003

Cc: President Kong, President Ji, President Wang

Cc: Liu Yin Zhen, Zhu Jiang

EXCERPTS FROM A JANUARY 28, 2005 SPEECH OF KONG TAI OF JIANGSU JIANSHAN PHARMACEUTICAL CO., "RECOGNIZE NEW TRENDS, DEVELOP ON BOTH FRONTS, AND BUILD A HEALTHY, SUSTAINABLE AND HARMONIOUS JIANGSHAN"

Recognize New Trends, Develop on Both Fronts, and Build a Health, Sustainable and Harmonious Jiangshan

Speech on the company's 2004 summary and commendation meeting

Kong Tai

(January 28, 2005)

Dear employees,

Today we are gathering here to review our achievement last year, to exchange experiences, to commend performance, to lay out our plan for 2005, and to mobilize everyone to recognize the trend, take the opportunities, and work hard for a healthy, sustainable and harmonious Jiangshan and do everything we can to accomplish our goals for 2005. My speech has three parts:

Part One Review of 2004

Redacted

Part Two Prospect of 2005

Redacted

II. Chinese VC manufacturers are fluctuating in their capacities

After two years of expansion, all of the four biggest Chinese VC manufacturers have a capacity for more than 15,000 tons, and among them, Weisheng has a staggering capacity for 30,000 tons. Shangdong Hualing, once in "coma," has developed rapidly with a capacity for 5,000 tons. These VC enterprises, mediated by Chamber of Commerce for Pharmaceutical and Health Products, took measures last year to limit production to protect price and to ensure a "soft-landing" of the price plunge, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time. To survive the new round of competition and come out of it better, we must depend on ourselves, becoming bigger and stronger. Only by knowing the enemy and knowing yourself, shall you be able to fight a hundred battles with no danger of being defeated.

Redacted

Part Three Work Plan for 2005

Redacted

Dear colleagues, our achievement has been a source of inspiration, and our goals motivate us to go forward. Let us come together in a high spirit, let us explore and innovate, and let us work diligently to build a healthy, sustained and harmonious Jiangshan and to make newer and bigger contributions to the fulfillment of this year's goals.

Finally, let me wish all of you and your families a happy, healthy and uplifting new year!

Thank you, everyone.

SELECTED PRETRIAL FILINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF QIAO HAILI, HEAD OF THE VITAMIN C SUBCOMMITTEE PURSUANT TO THE COURT ORDER OF JULY 11, 2012, DATED AUGUST 5, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MASTER FILE 1:06-MDL-1738 (BMC)(JO)

IN RE VITAMIN C ANTITRUST LITIGATION

This Document Relates To:

Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co., Ltd., et al., Case No. 1:05-CV-00453(BMC)(JO) (E.D.N.Y.)

AFFIDAVIT OF QIAO HAILI PURSUANT TO THE COURT ORDER OF JULY 11, 2012

I, QIAO HAILI, hereby state as follows:

1. I am a citizen of People's Republic of China and a retired officer of the China Chamber of Commerce of Medicines and Health Products Importers & Exporters ("Chamber"), where I held the position of Director of its Western Medicine Department from 1992 through March 2007. From October 1997 through my retirement I also served as Secretary General of the Chamber's Vitamin C Sub-Committee, created at the direction of the Chinese government to regulate and coordinate the export of vitamin C. I reside in Beijing, China and submit this affidavit pursuant to the Court's Order of July 11, 2012.

Educational History and Employment Summary

2. Prior to 1992, I served as a mid-level officer in the People's Liberation Army holding the rank of Vice Regimental Commander. In July 1983, while still serving in the army, I received a three year college degree in Chinese Literature from The Open University of China (formerly the China Central Radio and TV University).

3. In 1992, I retired from the army service and reported to China's Ministry of Foreign Trade and Economic Cooperation ("MOFTEC" or the "Ministry") for a position with the Government. On May 1, 1992, the Ministry assigned me to work for the Chamber and appointed me as the Vice Director of the Chamber's Second Coordination Department. In 1993, following the retirement of the Director of the Second Coordination Department, I became the highest level officer at the Chamber responsible for industry coordination of pharmaceutical products and medical equipment. The Second Coordination Department changed its named to Western Medicine Department in 1995. In 2004, the Department changed its name to Industry Coordination Department and administered and coordinated export regulation of pharmaceutical products (including vitamin C) and a few traditional Chinese medicines. In 2006, the Department was no longer responsible for administering export regulation of Chinese traditional medicines and changed its name back to Western Medicine Department.

4. In 1998, I was designated by the Ministry and appointed by the Chamber as Director of the Chamber's Western Medicine Department. In that capacity, I was

responsible for supervising and administering the industry coordination of pharmaceutical exports, including vitamin C. Until my retirement I was the highest level official at the Chamber responsible for administering export regulation of vitamin C as well as other pharmaceutical products. I reported to the Chairman of the Chamber, who was appointed by the Ministry and who in turn reported to the Ministry.

The Chamber's Creation and Mission

5. The Chamber was established in May 1989 by the Chinese government as part of an effort to reform its foreign trade regime. Prior to that time, China's export trading was controlled by a few designated state-owned import and export trading companies in accordance with mandatory State trading plans designed to achieve economic objectives set by the central government.

6. In the 1980's, China decided to open foreign trading rights to all categories of companies greatly increasing the number of companies engaged in foreign trade transactions, and companies began to engage in aggressive forms of competition with each other without appreciation of the adverse consequences of their conduct on both industries and China's economy. Frequently, the Chinese companies raced to expand their production capacity, competed with each other in relatively small markets for greater market share and more customers by cutting prices, regardless of the industry interest. Perceiving that this would endanger Chinese domestic industries' overall profitability and sustainable growth, the Chinese government as part of the foreign trade

reform created various chambers to oversee and regulate its industries' export activities so that they would act in unison when competing with foreign companies. The Government transferred some former government officials to the chambers' staffs and vested the chambers with regulatory authority.

7. A number of MOFTEC regulations formalized this structure and re-enforced the Chinese government's direct control and supervision of our activities on its behalf. Thus, for example, a 1991 MOFTEC regulation declared that MOFTEC was in charge of regulating the operations of the foreign trade and economic chambers (Art. 2), directed that chambers established with government regulatory functions had to implement MOFTEC's rules (Art. 14), and ordered that all foreign trade and social organizations had to accept the daily supervision and inspection of MOFTEC (Art. 19). This regulation, entitled "Measures for Administration over Foreign Trade and Economic Social Organizations" (February 6, 1991), is attached as Exhibit 1. It was in place throughout my period of employment and governed my activities. As such, I am personally familiar with its provisions.

8. A 1994 MOFTEC regulation directed that chamber staff be drawn primarily from the chamber's members and government authorities (Art. III-8), but top management was to be "recommended" by MOFTEC (Art. IV-13). MOFTEC's "recommendations" were in effect the same as directives since the Ministry would designate only one person who was invariably "approved." This regulation further mandated that chamber employee compensation and salary be implemented under state regulations under

the control and supervision of MOFTEC's Personnel Department, which was to verify and approve the total salary of the Chamber (Art. V-16, 17). A copy of this regulation, entitled "Notice of Ministry of Foreign Trade and Economic Cooperation regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters," dated September 23, 1994, Wai Jing Mao Ren Fa No. 540, is attached as Exhibit 2. It, too, was in place when I joined the Chamber, was in effect throughout my period of employment governing my activities while I was at the Chamber, and I am personally familiar with its provisions.

9. The Chairman and Vice Chairman of the Chamber, to whom I reported, were appointed by MOFTEC. We were all dependent upon MOFTEC for the approval of our salary and compensation, and we all directly reported to, and received instruction from the Ministry on a regular basis. Effectively, the top management of the Chamber served at the Ministry's pleasure and were subject to dismissal if it was dissatisfied with our performance. The Ministry was the highest level of Chinese government administrative authority for foreign trade.

10. While I have a general awareness that many chambers were supervising many products on behalf of the Chinese Government under this general framework, my specific personal knowledge of regulation is mainly confined to regulation by the China Chamber of Commerce of Medicines and Health Products Importers & Exporters, and the matters set forth in this affidavit are based on my personal knowledge of that Chamber's regulation of vitamin C.

11. Over the period of time while I was at the Chamber, the State Council and MOFTEC promulgated a variety of regulations under which we were delegated authority to regulate the foreign trade of our members in order to achieve the Chinese government's economic goals. In addition to the written directives and regulations I will discuss below, my Chamber colleagues and I also received from Ministry officials on a regular basis oral instructions and directives on specific issues and matters.

Establishment of Vitamin C Regulation and Vitamin C Sub-Committee's Formation

12. Since at least the 1990's, China's vitamin C industry (as an industry of great importance to China's national economy) has been under direct regulation and coordination, mandated by the Chinese government, with authority for such regulation directly vested with the Chamber pursuant to governmental regulation.

13. In 1992, when I joined the Chamber, vitamin C was as one of 38 products designated as subject to export quota administration because of its important position in China's export, with administrative responsibility assigned to MOFTEC and its local subordinate regulatory agencies. See MOFTEC, Interim Regulation of Export Goods, Order. No. 4, December 29, 1992, attached as Exhibit 3. Under section 4 of that regulation, with which I was personally familiar, such exports were "uniformly regulated and coordinated by the respective Import and Export Chambers of Commerce." Companies engaged in the producing and selling of these products were required to join the relevant Chambers, and the Chambers were required to adopt "specific coordination and regulation methods," which were to be "strictly implemented after discussion and approval by the member meeting."

Pursuant to this general delegation of authority, the Chamber regulated and coordinated the efforts of the Chinese vitamin C industry and I directly participated in this regulation.

14. In 1996, the Ministry issued a regulation, providing that export enterprises could not export at lower than "normal prices," defined as cost plus a reasonable profit. This regulation provided that exporters had to follow the coordination of the chambers, and as such directly governed the performance of my duties. It further declared that failure to comply would be subject to strict penalties including fines or loss of the right to export. A copy of this regulation, entitled "Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct of Exporting at Lower-than-Normal Price" (March 20, 1996), is attached as Exhibit 4.

15. In 1996, the Ministry issued a report to the Chinese State Council, distributed to the Chamber and received by me in the regular course of my business. That report was partly based on a report of mine to the Ministry about the issues in the vitamin C industry, which I drafted and submitted during the regular course of business at the Chamber. The Ministry reported to the State Council its dissatisfaction with the activities of Chinese vitamin C companies in export and the dangers that low prices posed to Chinese national economic interests. See Wu Yi, MOFTEC's Report to State Council Concerning Current Vitamin C Export Issues and Suggestions for Solutions, [1996] Waijingmao Guanfa No. 185, p.3, attached as Exhibit 5.

16. In 1997, Vice Premier Li Lanqing directed MOFTEC to address the issues identified in the 1996

MOFTEC report through further regulation and the creation of a Chamber Sub-Committee to coordinate vitamin C exports. Soon thereafter a number of regulations were promulgated by the Ministry to further tighten the direct authority, control and coordination of chambers generally pursuant to their government-delegated authority, and to improve the authority and coordination of the China Chamber of Commerce of Medicines and Health Products Importers & Exports in respect of vitamin C in particular. These regulations were sent to me in the regular course of the Chamber's business to follow and implement.

17. Specifically, in 1997, the Ministry and the State Drug Administration, acting jointly, then promulgated a regulation "related to strengthening the Chamber's administration of vitamin C production and export." As the officer administering vitamin C industry regulations, I participated in the Ministry's drafting of this regulation. This measure, which governed my daily activities, included mandates to strictly control vitamin C production scale. It imposed qualification requirements for conducting vitamin C exports, limiting vitamin C exporting rights to 30 companies. The regulation also specified the standard for allocating export quotas, and required the Chamber to strengthen the coordination of vitamin C exports. See MOFTEC & State Drug Administration, Notice Relating to Strengthening the Administration of Vitamin C Production and Export, (1997) MOFTEC Guan Fa No. 664 (November 27, 1997), attached as Exhibit 6. This regulation, with which I am personally familiar, was in effect in November and December of 2001.

18. Article 6 of this Ministry regulation directed the Chamber to establish a "Vitamin C Export Coordination Group," which we would refer to as the Vitamin C Sub-Committee., for the purpose of conducting the industry coordination of vitamin C exports. The Chamber was directed to formulate specific coordination methods and report these back to the Ministry. Under Article 7, the vitamin C manufacturers were required to strictly implement industry coordination measures under the Chamber's supervision, with penalties imposed for any attempts at circumvention. Under Article 8, the government agencies responsible for issuing export licenses were required to strictly review export contracts and issue export licenses only in accordance with the government mandated volume and price as coordinated and set by the Chamber. Companies who failed to comply with the industry coordination were subject to sanctions, including export quota reduction or even revocation of exporting right. (See Article 10).

19. As noted above, I became Secretary General of the Chamber's Vitamin C Sub- Committee, and as such I had direct responsibility to administer these directives and mandates from the Ministry. Early on, even before formal promulgation of the 1997 regulation, I was informed by the Ministry of the new Sub-Committee it would require the Chamber to create. I was the person at the Chamber who was in charge of that Sub-Committee's formation and I prepared and submitted a request to the Ministry to formally establish the Sub-Committee as per the Ministry's directive. In March 1998, the Ministry formally approved that request, and that approval document was delivered to me. "Approval for Establishing VC Sub-Committee of China Chamber of Commerce of Medicines & Health Products Importers & Exporters"

(March 23, 1998) (the "1998 Approval Directive"), attached as Exhibit 7.

20. Under this Ministry directive the Sub-Committee became a branch of the Chamber and subject to the Chamber's leadership and administration. Its personnel were drawn from the Chamber and its members were vitamin C exporting companies who were members of the Chamber. The Sub-Committee's major responsibility and regulatory function, also set out in the Ministry's approval, was to coordinate the vitamin C export market, price and customers of China. Its stated mission was both to improve the competitiveness of the Chinese vitamin C industry in the global market and to promote the healthy development of China's vitamin C export through industry coordination.

21. The 1998 Approval Directive remained in effect throughout my employment at the Chamber and was never revoked. As such, throughout this period the Sub-Committee remained responsible for coordinating vitamin C exports as directed by the Ministry. Although the designated mechanisms of regulation given to the Sub-Committee by the Ministry as tools to discharge this delegated responsibility were to change and evolve in response to China's assumption of membership in the global market, the Chamber's Government-delegated responsibility to coordinate vitamin C exports through the Sub-Committee never changed and there were always mechanisms through which we could effect that control.

22. In 1997, with guidance of the Ministry, I drafted a Charter to govern the activities of the Sub-Committee. The document which resulted, the Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers

& Exporters, (October 11, 1997), (the "1997 Charter"), attached as Exhibit 8, was designed by me to set forth the plenary authority of the Chamber over its members, and the requirement that they participate in the Sub-Committee's activities and follow the directives of the Chamber. The Charter was one of the documents submitted to the Ministry for request for approval of the establishment of the Sub-Committee.

23. The 1997 Charter, which was in effect in November and December 2001 and governed the Sub-Committee's functions at that time, states:

- "The Sub-Committee has the following tenets: implementing and executing the state policies and regulations on foreign trade; maintaining orderly export of vitamin C products; ... and serving for an orderly and highly efficient development of vitamin C foreign trade on the basis of unified coordination." *Id.*, Art. 3.
- "The Sub-Committee performs coordination, direction ... and supervision & inspection functions over its members." *Id.*, Art. 5.
- "Only the members of the Sub-Committee have the right to export vitamin C and are simultaneously qualified to have vitamin C export quota." *Id.*, Art. 12.
- Members were required to "comply with various directives, policies and regulations with respect to foreign trade, comply with the Charter and regulations of Vitamin C Sub-Committee and implement Sub-Committee's resolution" and

"strictly execute export coordinated price *set by the Chamber...*" *Id.*, Art. 15.

- "Any violation of the Charter of the Sub-Committee, failure to implement any resolution or regulation of the Sub-Committee and failure to perform any member's obligation shall be punished by the Sub-Committee by means of, according to gravity of circumstances, warning, open criticism and even revocation of its membership. The Sub-Committee will suggest to the competent government department, through the Chamber, to suspend and even cancel the vitamin C export right of such violating member." *Id.*, Art. 16.

24. Pursuant to the mandate of the 1997 Charter, all four Chinese vitamin C manufacturers – Northeast Pharmaceutical Group Co., Ltd. ("NEPG"), Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei"), Weisheng Pharmaceutical Co. Ltd. ("Weisheng") and Jiangsu Jiangshan Pharmaceutical Co., Ltd. ("Jiangsu") – became Sub-Committee members, and all four of these companies remained Sub-Committee members throughout the period of time of my employment at the Chamber and participated in the Sub-Committee meetings that I called. None of the other companies named as defendants in this case (China Pharmaceutical Group Ltd., Shijiazhuang Pharmaceutical (USA) Inc., North China Pharmaceutical Group Corporation, North China Pharmaceutical Co., Ltd. and North China Pharmaceutical Group Import & Export Trade Co., Ltd.) ever participated in any of the Government-mandated industry coordination meetings conducted under the Chamber's supervision and direction.

Operation of the Sub-Committee

25. As part of my responsibilities at the Chamber, and under the authority delegated by the Ministry, I served as the Secretary General of the Sub-Committee throughout my tenure at the Chamber. I also served as the Vice President from 1998 through 2001 and President since 2002. (Prior to 2002, a Vice Chairman of the Chamber served as the President.) As the authorized representative of the Chamber, I was required to administer industry coordination based on market changes. I organized and presided over meetings with Chinese vitamin C manufacturers, sometimes calling them myself and on other occasions directing that a member call and organize them. I caused notices to be sent to Sub-Committee members of scheduled meetings (usually at the Chamber's offices), identified export issues to be addressed by industry coordination, and required members to discuss and to agree upon appropriate solutions at these meetings.

26. Whether or not the members of the Sub-Committee agreed with the Chamber's agendas, they were all required to participate in this process and to reach agreement on industry coordination measures. These measures included developing export quota amounts for MOFTEC approval and insertion in its annual export plan which all exporters were required to follow, and the periodic setting of minimum prices which all exporters were required to charge. I regularly reported the Sub-Committee's administration of industry coordination to the Ministry for its approval and review and oversaw the Chamber's efforts at monitoring compliance.

27. This overall process of mandated meetings, discussion and coordination was conducted in accordance with an overall policy directive of the Chinese Government; and we regularly reminded the Chinese vitamin C industry of this requirement on many occasions. For example, the Chairman of the Chamber at a December 4, 2000 Sub-Committee meeting which I chaired stated to the exporting manufacturers that they needed to be united together and to act in unison to face foreign parties.

28. In a meeting held by the Chamber on April 13, 2001, a MOFTEC officer in my presence reminded the vitamin C manufacturers that their product had been strictly regulated since 1997, and reminded them of the importance of the Chamber in this process. The officer further told them that the Sub-Committee was required to act proactively and that the industry had to obey this coordination and the industry rules. A few days later, I issued a notice again telling all manufacturers of their responsibility to adhere to the price set by the Chamber and that non-qualifying exports would result in the cancellation of quotas.

29. On many occasions we were told by MOFTEC, and we reminded the vitamin C producers, of the importance of exercising self discipline. Basically this meant that members of an industry are required to act in ways consistent with the economic interests of the State, and are required to discipline their activities so as to achieve the economic objectives directed by the Government. The Chamber, and the Vitamin C Sub-Committee which I chaired, were the Chinese government-delegated organizations responsible for coordinating and achieving this self-discipline.

30. As employees beholden to the Government for our position and approval of salaries, and reporting to the Ministry, we at the Chamber were responsible to direct and regulate our members and MOFTEC delegated us the authority to do so. As industries with significant government ownership, with their management from the Communist Party and government agencies, our members were expected and required to attend our meetings, and to follow our direction.

November and December 2001 Chamber Meetings

31. In late 2001 the Chamber called and I presided over Vitamin C Sub-Committee coordination meetings held under the Ministry's direct order to address potential foreign antidumping investigations. These meetings were prompted by warnings from the Chinese Embassies in Brussels and Berlin about a threatened antidumping investigation against Chinese vitamin C exports, and directions by the Ministry to us at the Chamber to call a Sub-Committee meeting and develop a coordinated plan to address the situation.

32. Specifically, it was part of our normal business to receive communications and instructions from the Ministry regarding economic policy. In September 2001, the Ministry sent to the Chamber a Chinese embassy report from Brussels warning of a possible dumping suit. A copy of this report, which I received in the normal course of business, is attached as Exhibit 9.

33. Then, in early November, the Ministry sent a situation report from China's embassy in Berlin to the Chamber's liaison officer, with the written directive that we convene a meeting of the Chinese Vitamin C producers

to address the situation.[1] This report and that directive were given to me by the Chamber's liaison officer in the normal course of our business. A copy is attached as Exhibit 10. Following that directive, I convened a meeting of the vitamin C manufacturers.

34. This meeting, over which I presided as Secretary General of the Sub-Committee, was held at the Chamber's offices on November 16, 2001. In attendance were the representatives of the four vitamin C manufacturers: NEPG, Hebei, Weisheng and Jiangsu. Also in attendance were the President of the Chamber, the Vice Chairman of the Chamber and the Liaison Director of the Chamber.

35. The meeting began with reminders from me and the Chairman of the Chamber of the principles under which the Sub-Committee operated and their obligation to follow the direction of the Chamber. I summarized the threats of anti-dumping proceedings as had been reported to us by MOFTEC, as well as MOFTEC's direction that the Chamber address the situation. I also advised them that industry coordination enforcement regulations were going to change, and that the Chamber would be empowered to review contracts and would refuse to give its approval to any export contract which did not comply with the coordination measures the Chamber would require them to adopt. This is the so-called "Verification & Chop."

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1. There is a handwritten note on this situation report from Xiao Xia, an official of MOFTEC's Fair Trade Bureau, to Vice Liaison Officer Guan stating "Is there a need to convene a meeting to analyze our future export situation?" which was the Ministry's typical way of directing us to take action and convene a meeting.

36. Under my supervision and at my direction there was then extended discussion among the manufacturers to reach agreement to increase the minimum export coordination price to $3/kg from $2.8 and to export only at certain allocated volumes. Because there was some disagreement among the manufacturers as to volumes that could be exported, I told them the volumes they would be required to accept, exercising the power I had under the existing 1997 regulations, the ongoing 1998 Approval Directive, and the verification & chop powers in preparation. At the conclusion of the discussion, and as directed by the Chamber, the attendees by hand-voting, unanimously passed the required resolution, and I so reported to MOFTEC.

37. In December 2001, I held another meeting with the manufacturers regarding the coordination measures agreed to at the November 2001 meeting. I reviewed the contemplated changes to the form of regulation, told them that industry coordination would continue to be required, and that I would not stamp approval on any contracts which did not comply.

Changes in Mechanisms due to WTO

38. China's accession to the World Trade Organization ("WTO") in December 2001 led to changes in the organizational format of the Vitamin C Sub-Committee and the mechanisms utilized by the Chamber in its review and coordination of vitamin C exports. But this did not change the delegation of responsibility of the Sub-Committee members to exercise self-discipline under the direction and auspices of the Chamber as had been formally delegated in 1998 and which remained unchanged. As matter of practical fact and effect it did not

change the fact that the Chinese vitamin C industry had to attend Sub-Committee meetings which the Chamber called, follow our agendas for discussion, and had to reach agreement by consensus at those meetings on self discipline and coordination. The Chamber continued to have power and the duty, delegated by the government, to enforce these agreements.

39. To explain, prior to China's accession to the WTO, Chinese vitamin C exports were subject to a quota licensing system administered by the State where each exporter was required to apply for an export license for each of its export transactions. Only companies identified in the 1997 MOFTEC & Customs Notice were permitted to engage in Vitamin C exporting. By the end of 2001, 21 companies remained in the vitamin C export business, of which four were manufacturers and the remainder were trading companies. To receive a vitamin C export license, an exporter had to observe volume limitations set by the Ministry and minimum price restrictions set through industry coordination mandated, directed and administered by the Sub-Committee. A local or central MOFTEC export licensing office would issue an export license only when the export price and quantity stated in the export contract satisfied the volume and price requirements. The Chinese Government, through its Customs, was directly involved in the administration of vitamin C exports. See 1997 MOFTEC & Customs Notice, discussed above.

40. In March 2002, as part of its accession to the WTO, the 1997 regulation was repealed. List of the Fourth Branch of Departmental Decisions Abolished by the Ministry of Foreign Trade and Economic Cooperation, Order No. 24 (March 21, 2002) item 11, attached as Exhibit

11. In its place, the Ministry instituted a new mechanism "in order to accommodate the new situations since China's entry into the WTO, maintain the order of market competition, [and] promote industry self-discipline." Notice Issued by the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs for the Adjustment of the Catalogue of Products Subject to Price Review by Customs, MOFTEC MAO FA [2002] No. 187 (March 29, 2002) (the "2002 Regulation"), attached as Exhibit 12. This regulation directly governed the performance of my duties and as such I am personally familiar with its contents.

41. In this regulation, we were instructed that the new mechanism, known as "verification and chop," would be "conducive for the chambers to coordinate export price and industry self discipline." Specifically, all contracts covering export of vitamin C by anyone, regardless whether or not they were made by a Sub-committee member, would now be administered by the Chamber under authority delegated by the Government and before being submitted to Customs. Instead, the contracts were to be submitted to me and my staff for review to ensure they were consistent with the self discipline agreements reached under our supervision and direction. If we verified that the contracts were consistent with those mandated agreements, we would affix the Chamber's "chop," and the shipment could proceed. The Chinese Customs would not review the contracts, but they would look for our "chop": if our chop was not on the contract, Customs would not accept the application for export and the export would not proceed.

42. Although the Verification & Chop regulation explicitly mentioned only review of price, our mandate to effect general coordination of the vitamin C export business under the 1998 Approval Directive continued. As such, the Chamber decided to use this review tool to review both prices and quantities and for certain periods of time would set export quotas applicable to products manufactured by China's vitamin C producers.

43. In 2003, the Ministry and Customs issued a more detailed regulation. See Announcement of Ministry of Commerce of the People's Republic of China and General Administration of Customs of the People's Republic of China, No. 36, 2003 (November 29, 2003) (the "2003 Regulation"), attached as Exhibit 13. This Announcement expressly detailed that all vitamin C exporters were to submit their contracts to the Chamber, and that we would verify them based on the "industry agreements" adopted under our direction. It specifically provided, consistent with the practice that we had already adopted, that the Chamber would not affix its chop to non-conforming contracts.

44. A new Sub-Committee Charter drafted by me was adopted Jun[illegible] 2002, and contained several statements to be consistent with the changes in the vitamin C regulation provisions. However, the new Charter continued the fundamental principle that the Sub- Committee was required to accept "guidance and supervision from the Chamber." (Art. 4). The Sub-Committee's mandate to coordinate the vitamin C market continued under the 1998 Approval Directive; and consistent with that directive, the new Charter directed

that the Sub- Committee "shall coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry, maintain the normal order for vitamin C import and export operations, and protect the interests of the state, the industry and its members." (Art. 8). Members continued to be obliged to accept the coordination of the Sub-Committee (Art. 17).

45. With these acknowledgments, and the power over the verification and chop delegated to us by the Government, the Chamber as a practical matter retained the ability to direct and coordinate agreements, to threaten to withhold its chop unless satisfactory agreements were reached, and retained the power to prohibit exports that were inconsistent with the agreements reached under our supervision. Although the new Charter provided that the Sub- Committee became a "self-disciplinary industry organization jointly established on a voluntary basis" (Art. 3), as a practical matter, no manufacturer could abandon participation in the Sub- Committee or the meetings that the Chamber called.

46. This is because those meetings, under the Chamber's guidance and direction, were to establish the prices and volumes which would meet with our approval and chop. Anyone not participating in those meetings was still subject to verification and chop monitoring to ensure compliance with the Chamber's coordination decisions. ("For V&C applications made by non- member exporters, the Chambers shall give them the same treatment as to member exporters." 2003 Regulation, Exhibit 2, item F.) Those trading companies which did not join the Sub-Committee nevertheless had their export volumes charged

against the export quotas of the manufacturer who sold them the product, and their contracts were nevertheless subject to our price review. As such, the trading companies' export sales remained under the control of the Chamber.

47. My colleagues and I at the Chamber continued to be employed and compensated under MOFTEC's supervision, and were now delegated new "verification and approval" powers which kept us a position where we could compel all exporters to comply with industry coordination directions resulting from the self discipline mandated by the government. Exports of vitamin C, while no longer under the direct administration of the Chinese Government, continued to be subject to self-discipline under the direction and coordination of the Chamber, subject to the verification and chop enforcement powers delegated to us by the Chinese government. We continued the regulation of vitamin C exports, which remained subject to the verification and chop system.

48. I am aware that the Ministry and Chinese Customs' 2002 verification and chop regulation contains a provision, which provides: "[g]iven the drastically changing international market, the customs and chambers may suspend export price review for certain products with the approvals of the general members' meetings of the sub-chamber (coordination group) and filing with [Customs and MOFTEC]." However, this provision did not give the Sub-Committee the unilateral power to suspend the verification and chop system because as clearly stated in the Sub- Committee's Charter, the Sub-Committee was supervised and guided by the Chamber. See Sub-Committee's 2002 Charter Article 5. The manufacturers

did not have the authority to discard the verification and chop system and during my tenure as the Secretary General of the Sub- Committee, there was never any discussion about even the possibility of discarding the verification and chop system with respect to vitamin C exports. Hypothetically, if any manufacturer had ever proposed abolishing the verification and chop system concerning vitamin C exports, I would report such proposal to the Ministry as part of my responsibilities and it would be a matter for the Ministry's review and determination. The manufacturers had no authority to effectuate such a proposal on their own. Indeed in the 2003 regulation the verification & chop regulation was forcefully re-promulgated by the Ministry.

49. The verification and chop system provided the Chamber with an effective tool to enforce industry self discipline and coordination, and the Chamber on a website page added in mid-2002 so publicly reported, stating "Beginning on May 1, 2002, vitamin C was listed as a product requiring price reviews by China Customs and a seal of pre-approval by the China Chamber of Commerce, which has provided powerful oversight and safeguards for the implementation of self-discipline agreements among domestic manufacturers." The webpage, added several months after the November-December 2001 meetings, also contained statements reflecting the Chamber's sensitivity to China's new WTO obligations, but clearly described the work of the Chamber's vitamin C Sub-Committee and the verification & chop mechanism.

50. Under verification and chop, as before, China's vitamin C manufacturers did not have the option of ignoring or not participating in the self-discipline process itself or the duty to coordinate which it entailed, nor

could anyone familiar with the Chinese Government's self- discipline policy, the organization of the Chamber or the delegation of verification and chop authority within that policy, reasonably draw any such conclusion. The Government's Ministries themselves did not determine specific prices or quantities, and the Government itself did not intervene in those discussions. But the Government created the Chamber, designated its officials, delegated us powers, and reviewed our actions and required the Chamber to coordinate. Industry members, subject to the ongoing self discipline mandate and the verification & chop oversight tool given to us by the government, had to attend the meetings that were called, and they had to discuss and reach agreement at those meetings under our supervision.

51. The Chamber was never relieved by the Government of its coordination responsibilities, the Sub-Committee's authorizing mandate continued in effect, and we continued our process of mandatory coordination as before. Throughout my entire tenure at the Chamber, I have warned the manufacturers, on numerous occasions, that I would exercise the Chamber's powers not to provide the chop on their export contracts unless they were compliant, and on several occasions I did exercise these powers.

52. The meeting held in late 2001 in response to threatened dumping action, which I have described above, was one such example.

53. During mid-2002 through early 2003, each of the manufacturers on occasion presented contracts which would exceed their quota. In such circumstances my staff denied them a chop and forced them to wait until the following month.

54. In late 2003, after a period of significant price decline subsequent to the SARS epidemic where the vitamin C export price sharply dropped from an average of $9.20 in the summer of 2003 to around $4 in three months, I called several meetings and ultimately at my direction the manufacturers agreed to limit production during the first half of 2004.

55. In 2004, I told the companies that a mechanism had to be found to limit exports and thereafter I directed that they implement a proposal to create and stock a warehouse in Shanghai.

56. Subsequently, to compel Weisheng to comply with the coordinated shutdown schedule, I delayed stamping on its export contracts with the Chamber's chop.

57. In December 2005, I presided over a Subcommittee meeting where I required vitamin C manufacturers to implement the industry coordination measures of suspending production in April and May of 2006. To ensure the implementation of the measures, I warned manufacturers that if any company quoted a lower price than the minimum export price or did not stop production as mandated, the Chamber would not issue export verification approvals to that company until it became compliant.

58. In June of 2006, while the Chamber acceded to requests from NEPG to postpone its production suspension until July, I made a telephone call to Du Chengxiang of NEPG to force NEPG to avoid further delay. I reminded Mr. Du of NEPG's obligation to follow industry coordination and told him that if there was

any continued delay the Chamber would impose a series of sanctions on NEPG, including denying verification approval.

59. This is not to say that the administration of mandated coordination and self- discipline was perfect. The Chamber could not force self discipline in ways contrary to market realities or the basic laws of supply and demand. At some meetings agreement was possible, while at others as matter of overriding economics it was not. Often these matters required extended discussion and I listened to and considered points made by the industry before formulating decisions. In some circumstances, the Chamber later had to consider modifying the coordination measures to address the market conditions with more practical measures in light of economic circumstances.

60. While I enforced the coordination measures within the bounds of the Chamber's authority, as with any other regulatory measures there was no guarantee that circumvention would not be attempted. While all contracts were inspected before affixing our chop and we refused to affix our chop to non-conforming contracts, our ability to investigate whether the export price was compliant beyond the face of the contracts was limited.

61. In addition, the Chamber had no control over pricing once the product left China. In a falling market, buyers and brokers were able to obtain post chop price concessions and rebates which were beyond the ability of the Chamber to stop. Sometimes this came to our attention via requests from China's Foreign Exchange Authority to give a statement to it so that proceeds collections in

foreign currency which were less than contract prices could be remitted. There were occasions where we refused to give such a statement, such as in mid-2003, and this in turn presented exporters with payment delays and risks of penalties under exchange procedures; but customers and brokers continued to exert their power to exact price concessions from Chinese manufacturers.

62. Also, there were several instances of basic changes in market dynamics, such as the withdrawal of vitamin C producers in other countries, the SARS outbreak in late 2002 through the middle of 2003, and a second epidemic in late 2003-2004, where prices rose significantly on their own.

63. By way of example regarding the imperfections in our administration and the need to respond to basic economic situations, at the November and December 2001 meetings discussed above, the manufacturers under our mandate reached self-discipline agreements on minimum export prices and export volume as the Chamber required. At that time, these agreements had been expected to be implemented in early 2002, but the government did not actually promulgate the 2002 verification and chop regulation until May. At that time, I received a report from the Customs showing that there had been an excess of more than 1,000 tons in the vitamin C export since January 1, 2002. Because the market demand and supply were out of balance, the companies were unable to implement the agreement and they seized opportunities to make more sales when they could. I devoted significant time and effort to investigate and determined who made the excessive export, criticized them in a Subcommittee meeting, and deducted from the excessive amount from their remaining annual export allocation.

64. As another example, during the first SARS epidemic in late 2002-early 2003, vitamin C prices rose significantly. However, as the vitamin C price increased, almost all Chinese manufacturers expanded their production capacity. While the Chamber was authorized to make recommendations to other Government agencies on new capacity additions by Chinese manufacturers, this was something the Chamber was given no authority to regulate. Consequently, in mid-2003, as the SARS outbreak subsided, there was excessive supply of vitamin C in the market and prices started falling.

65. At this point the Chinese manufacturers started a "price war" by making great price cuts in order to secure more export sales, and it was anticipated that the price would fall continuously in the second half of the year. In June 2003, I held a meeting with manufacturers and required manufacturers to develop industry coordination measures to stop the price war. As I required, the manufacturers discussed market conditions and agreed to set a floor price of $9.20. However, that measure was simply unrealistic in light of the market conditions. As a result, in July 2003, I held another meeting with manufacturers and during that meeting the $9.20 price was cancelled.

66. As the price continued to fall, I continued to invoke the self-discipline mechanism to search for a solution. I called for and held another meeting in September 2003 to discuss industry coordination measures. At my direction, manufacturers discussed potential measures including export volume and price restrictions, but neither appeared practical in view of economic circumstances and no solution

was found at that meeting. Finally, as I discussed above, in December 2003, I held another meeting again to address the industry coordination measure and the manufacturers agreed, at my direction, to suspend production in the first half of 2004. The other manufacturers subsequently complained that Weisheng failed to suspend production; but, as noted above, I was ultimately able to compel Weisheng to resume compliance.

67. Sometimes self discipline was effective and sometimes it was not. However, whether the industry coordination measures adopted under our mandate were effective or not, the Chinese vitamin C manufacturers were required at all times to participate in industry coordination discussions, following the agenda the Chamber set. There may have been circumstances where economic conditions negated the agreements we directed be made, but that does not mean they had a choice not to participate in the industry coordination process, or a choice not to reach agreements under my direction as dictated by economic conditions.

68. I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

In witness whereof, I have executed this declaration on this 5 day of August 2012.

/s/

Qiao Haili

SELECTED EXHIBITS FROM TRIAL HELD IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SELECTED PLAINTIFFS' TRIAL EXHIBITS

Q3 2004 WORK SUMMARY FOR INT'L BUSINESS DEPARTMENT, DATED OCT. 1, 2004

In Q3 of 2004, with the guidance of the leadership of the Company, under the circumstances of significant changes to the international VC market and to the Company's internal conditions like production etc, the Int'l Business Dept. made correct judgments on market situations, acted properly according to the changes. We transformed pressures into motivations, strengthened the management of the department, and aggressively competed in the int'l market. We also adjusted our strategies in marketing and sales, and continued to develop our mission, strategies and organizational structure. Now, we summarize our work in Q3 as follows:

I. Completion of major business targets:

Project/Targets		Targets for Jan. to Sept.	Actual completion of Jan.-Sept.	Actual/Target Ratio (%)
Sales Volume (Ton)		8414	8117.12	96.47
Sales revenue (¥10,000)		32855	32491	98.89
Received payment (¥10,000)		32855	33231.58	101.15
Payment receipt ratio (%)		100	---	101.15
Sales of Major Products	VC	7294	6663.75	91.36
	VC-Na	677	773.075	114.19
	VC-CA	140	102.475	73.20
	VC granules	568	577.82	101.73

Notes: (1) The sales volumes did not include gulonic acid (80tons/month), which was 800 tons total from Jan. to Sept.;

(2) The factor that prevented VC sales from meeting the 100% target was the actual lower production output, therefore, as a result of this, by the end of Sept, the accumulated export volume was 300 tons less than the targeted volume.

II. In order to smoothly meet the targets given by the Company's guidelines, our department focused our work in the following aspects:

(I) Internal management

1. Improved our business flow process and enhanced the management on basics. From sales ideas to the quality of the work force and to team work, we were striving for an overall lift, so that we could better manage our business and improve our customer services.

2. Segmented the market into 3 business territories in a reasonable manner based on our years of experience in foreign trade, and further refined the segmentation: among the 3 territories, each had its specific purpose but still contained some reasonably crossed sections, making it favorable to streamline management and increase sales. The segmentation also avoided overlap in customer management, effectively eliminating multi-quotes of our products in a specific region.

3. Enhanced the system of incentives, rewards and punishments: as the new production line boosted our output, we added more incentives to encourage sales employees to explore new business growth besides the completion of their assigned sales volume. We increased the evaluation weight of some components in performance-oriented awards, and are considering setting up awards into single assessment items, for example, to give fat bonuses to those who bring in new key customers, or break into regional markets that have fairly good potentials, or make outstanding contributions to the sales volume or the profit. All these measures were to aggressively motivate business personnel.

4. Improved the coordination with other departments in the Company

Actively coordinated with closely-related departments such as production, quality control and workshops within the Company; through mutual support and collaboration, timely solved complaints and issues raised by customers, and, conveyed an overall positive image to the customers through the process of communicating and serving them.

(II) Paid attention to market status analysis and improved coordination in the industry

1. Carefully analyzed the government's macro policies and international VC market situations, including the anti-dumping movements. We stepped up studies on rivals, fully thought over the various factors that might affect the VC export sales and got mentally prepared accordingly, proposed and gradually implemented corresponding reasonable measures in a planned way.

2. As to the current development of VC market, it is still unclear on the outcomes of the negotiation between BASF and NEPG and the cooperation between DSM and NCPC. We are going to closely watch them. At the same time, we studied operations, the cost situation, and strategies on product sales of domestic VC producers to help us make decisions. According to our analysis of the VC export market in the 1st half of the year and the market forecast for the 2nd half of the year, and our analysis of the export data of each producer compiled by the Customs, with the supplementary help by the "outer brain" - the information consulting company, we produced the VC market overall study report and submitted it to the Company leadership for its review and understanding.

3. Fully exerted our Company's function as the rotating Chairman of the VC Chapter of CCCMHPIE, proactively organized and participated in the coordination meetings of the VC Chapter of CCCMHPIE. We organized the large producers to coordinate and adjust industry strategies, enhanced our work in regards to the strengthening of the self-regulation in the industry, the stabilization of the market price and the guiding of the market to develop in a normal way. In the aspects of organizing meetings and implementing the resolutions of meetings, we also inputted a lot of our energy.

(III) Through "Go-out-to-visit and welcome visitors," increased exchanges with customers and built up the customer pool

1. In July, we attended the IFT meeting and expo in the US. This is a highly professional event, held once in a year in big cities across the States. It gathered almost all food-related industries in the States, with an influx of exhibitors and visitors in the production and distribution fields. Most of them were from the US, and quite a number of them were from Latin America. The others were from Europe and Asia. We received many of our old customers and a lot of new customers at our booth. This had a very significant meaning to us in developing the markets in North America, Latin America and Southeast Asia. After the event, we visited out key customers on the US west coast, learning the local market situation and future development possibilities.

2. In September, we visited our key customers in Europe. According to our customers' reaction to market changes after the vacation season and our timely tracking

of market changes, as well as communication exchanges that we had with our long time customers in the traditional markets, we had a better in-depth understanding of local market conditions and their sales channels. We also investigated the conditions as to setting up a warehouse in Hamburg, and promoted the warehouse to customers, expressing that the warehouse would provide excellent customer services and spot delivery of goods. Customers were pretty interested in it. During our European visit, we also visited some new customers. This ensured us solidifying the traditional market, expanding our customer base and developing new market share.

3. In August, we participated in the Indonesian pharmaceutical meeting organized by CSPC and visited local key customers afterwards, to exchange information on market demand and the market situation, and to further learn about market demand and user distribution. Visiting Indonesia and meeting with new customers were successful attempts for our Company in the effort of exploring the Southeast Asia market, and was very beneficial to us in further seeking and developing new cooperative channels and emerging markets.

4. In August, after overseas customers ended their summer vacations, we had a lot of customers visit us. During this period of time, we continuously received key existing customers from Japan, Europe and the US and new customers that we had not yet started business with. We also had a quality audit on the new production line by customers. In addition, we had complete market information changes with them. The customers were very interested in our new production line, particularly in the fact that our Company became the largest VC producer.

This piece of news was very encouraging in strengthening the current cooperation between the customers and Weisheng and boosted the chance of potential cooperation with new customers. The customers stated that they would increase or begin their cooperation with us

"Go-out-to-visit and welcome visitors" will continue to play an important role in carrying out our sales work in Q4 and even sales work for next year and for generating new customers.

5. Improved the quality of the customer structure and expanded clientele pool

(1) Customer's creditworthiness: conducted credit investigations on the credit reputation of our major customers and our rival's key distributors; built on this credit analysis, we focused on the optimization of customers, traders and distributors to ensure the continuation of business with creditworthy customers, and sought new growth opportunities according to the facts found, ultimately keeping business on a healthy development track.

(2) Re-optimized clientele: maintained and expanded the current key customer base and the established markets; at the same time, reached out to competitors' distributors, aiming at setting up business relationships, for instance, stepped up communications with Great Earth, AMC etc. in order to grab major customers from our rivals without interrupting our current distribution channels.

(3) Increased our business share with end-users: kept in close contact with Pepsi-Cola, Seven-Up and

large granule uses like Leiner and Amway to expand our business volumes with them.

(4) Set up and ran the Hamburg warehouse in a reliable way, and planned to set up another warehouse in the US to ultimately realize the goal of spot transactions, reducing market risks and placing us in a competitive advantage when the market is very fluid.

(IV) Enhanced the payment collection of sold goods to avoid payment risks.

1) When signing contracts, payment credit periods were strictly limited in order to minimize risks; constantly tracked a customer's operations, cash flow status and timely adjusted the payment terms and line of credit; and promptly sent out warnings on over dues.

2) Conducted analyses twice on A/Rs each month and urged sales persons to press for payments; utilized the performance assessment system by tying the performance evaluation with the receipt of payments and/or full payments, thereby intensifying the full payment awareness of sales persons.

3) Increased the work of collecting payments: using legal methods, with innovative ways such as sending people to Kunshan Foreign Trade Co. to collect overdue payments, we were able to make great progress in this regard, as such, we completed the planned first 3 stages of payment collection and brought in a total of ¥4.15 million of over dues. We anticipated that by the end of the year, the balance of ¥1.3 million over dues would be received, thereby completely solving the problem of bad debts.

(V) Continuation of team building and upgrading of work force

1) Intensified studies on politics to understand the government and industry's guiding principles and policies; vigorously participated in training organized by the Company and enhanced teamwork mentality; instilled a sense of crisis in employees to boost the awareness of developing new business.

2) Meanwhile, boldly thought out of the box, by creating innovative management, and pursued a systematic and scientific management method. Through training in foreign trade negotiations to all department employees, we improved the marketing sales skills and price negotiation techniques which uplift the overall quality of the department; we also trained our employees in etiquette in the business environment to pave the way for international marketing and sales.

III. Existing problems:

1. The market is not optimistic. At present, the VC market is still complicated and unclear. The outlook is not very sanguine.

Right now, it is not clear what kind of cooperation will take place between NEPG and BASF. NEPG's current customers are looking ahead or currently selecting new partners. The same is true to the cooperation between DSM and NCPC. Although the maintenance and repairs by Welcome and the internal fitting will slightly decrease the overall production output, which offers a little buffer to blunt the price slippage, nevertheless, the long term prospects of the market are too difficult to determine.

Shangdong Hualong has reached a capacity of 8,000 tons a year. We must keep a close eye on them. Now, each large producer is on high alert and is preparing future sales battles in every aspect, ranging from product structure, production adjustment, market development to sales mechanisms. We should not let our guard down, rather, we should prepare for a hard fight down the road.

2. We must improve our management and upgrade our business knowledge.

Our priority is to enhance our sales force buildup. From deploying personnel, upgrading employee quality to cultivating sales concepts to team work building, we need to improve our overall competency. To professionalize our management team, building up an effective, teamwork-oriented sales force are musts.

V. Work focus for the next quarter:

In Q4, we are going to concentrate on the following tasks:

1. Focus on the expansion of the market share, proactively develop the international market, enlarge the customer pool; actively pursue the maximum sales volume without compromising the profit ratio: first of all, satisfy the demand of long time customers and customers with long-term contracts, secondly, meet the demand of new or potential customers, trying to gain additional market share.

2. Maintain the prevailing policies to traditional European, US and Japanese markets, and continue to develop these markets.

(1) Encourage our sales persons to obtain the local end-user customers' business and sign more long term contracts, so as to prepare ahead for a hard fight next year. After judging the pros and cons, establish cooperative relationship with those local influential distributors who haven't yet had business with us.

(2) Meanwhile, speed up the operation on leasing spaces for setting up warehouses to solve the issue that some customers would not purchase products from us over concern of ocean shipping risks.

(3) On the basis of securing a significant number of long term contracts, expand our market development into emerging markets – Southeast Asia and South America.

3. Do well in marketing and carry out a "market network" program.

(1) Pay attention to information gathering, so as not to fight blindly. Know our enemy and know ourselves, we can fight many battles with no danger of defeat, and emerge as a winner in competing in the international market.

(2) Pave the way for us to enter the pharmaceutical market: focus VC derivatives primarily on the European and Japanese markets; when the situation allows in the future, switch to the US and Australian markets.

(3) When selling VC to the Canadian market, we need to build up the customer pool of VC derivatives, so that we are fully prepared to develop the market for the products to be produced after the new line in the deep processing workshop that will be put in use next year.

In general, for the Q3 work performance, the Int'l Business Dept. benefited greatly from our good judgment

on the market situations, and subsequent preparation work and quick reactions. For our work in Q4 and next year, we will further learn from our experiences and lessons, and continue to execute effective policies and measures. Nevertheless, we need to find out the shortcomings that we had and correct them, to prepare us to fight the upcoming competition in the international market.

International Business Dept.

Oct. 1, 2004

MEMORANDUM OF CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS, "SUGGESTIONS TO ESTABLISH A CREDIBILITY SYSTEM," DATED JULY 17, 2003

CHAMBER OF COMMERCE FOR IMPORT & EXPORT OF MEDICINES & HEALTH PRODUCTS (CCCMHPIE)

Suggestions to Establish a Credibility System

[2003] yi shang zi No.52

Re: Suggestions to establish a credibility system

The Office of the National Taskforce for the Rectification and Regulation of Market Economic Order,

According to the July-14 meeting requirement, CCCMHPIE now reports to you regarding our Chamber of Commerce's work in industry self-regulation and credibility building as follows:

1. Work in industry self-regulation and credibility building

This Chamber of Commerce's work in this regard is divided into two parts. One is in the category of western medicines, which is primarily focused on commodities that are exported in high amounts, or commodities that have surplus production capacity or the production capacity may become excessive, or which supply exceeds demand, or in severe low-priced competition in order to sell, or commodities that may lead to anti-dumping law suits. In this part of the work, the coordination of VC has yielded notable results: through industry self-regulation, prices

of VC exports have increased significantly and thus have recovered economic losses for the country. From Jan. 2002 to May 2003, in comparison to the price of US$2.80/kg at the end of 2001, VC exports brought in additional revenue of more than US$63 million. Another part of the work is in the category of traditional Chinese medicines, which are primarily concentrated on the establishment of standards. CCCMHPIE formulated the "Green Industry Standard for the Import and Export of Medicinal Plants and Preparations." This standard was promulgated by the former MOFTEC in the form of a statute and went into effect on July 1, 2001. The publication of this green industry standard ended the history that our country didn't have a standard for the import and export of traditional Chinese medicinal products. This standard has been recognized by the Singaporean health administration, South Korean Import and Export Association and the British Association of TCM Suppliers.

So far, over 120 lots and products of more than 30 companies have submitted the application for standard compliance.

2. Thoughts on the work of industry self-regulation and credibility building

Medicines and health products are special products. In order to safeguard medication safety and efficacy on human beings, it is necessary to have certain standards to govern companies engaged in medicines and health products. At present, in the production side, the "Pharmaceutical Administrative Law of PRC," only governs drug producers that sell domestically. There

are no stringent requirements on drug producers that solely export. In the foreign trade side, medicines and health products are treated as regular commodities and any import and export company can engage in the trade of medicines and health products. Therefore, in reality, there are many illegal or sub-standard drug producers that are making fake products, copycat products and unqualified products. These products are then exported to international markets by unlicensed medical and health products exporters. From time to time these products cause disputes and in the worst cases, drug poisoning. This severely damages Chinese medical and health products in the world and also offers excuses to foreign countries to set up technical barriers. In order to change this situation, CCCMHPIE plans to formulate the "Administrative Standard on the Engagement of International Trade of Medicines and Health Products" and will thereby push forward the licensing requirements of companies to engage in the international trade of medicines and health products.

3. Suggestions to establish a credibility system

Building a credibility system cannot be separated from industry self-regulation and the industry's self-regulation can't do without the chambers of commerce. However, the legal standing of chambers of commerce is still not clear. Regulations and rules formulated by companies in the industry organized by the chambers of commerce lack legal basis and are difficult to gain support from government departments. These rules and regulations simply become formality and only "honest fellows will follow."

Therefore, first of all, we need legislation to define the legal status of the chambers of commerce. We also need support from relevant government departments to assist chambers of commerce in asserting their authority, so that *(chambers of commerce)* can punish companies who engage in smuggling, tax evasion or who have little credibility, and can honor those who are trustworthy, thereby creating an environment for a credibility industry.

Secondly, we are thinking whether we shall establish an enterprise credibility assessment system by the chambers of commerce. This system is to evaluate the credibility and give grades on the level of credibility. The evaluation result shall be notarized by notary public companies and be made public and serve as a supplementary tool to authorities such as customs, commodity inspection bureaus, the state administration of foreign exchange and the state administration of industry and commerce.

Thirdly, in accordance with the principle of unifying domestic and international trade, we need to solve the issue of companies which engage in foreign trade but cannot engage in domestic trade. According to the Pharmaceutical Administrative Law of the PRC, only companies which obtain the "drug operation company license" can engage in drug operation. However, this regulation only applies to domestic trade, not to foreign trade. Although, some well-established medicine and health product import and export companies later obtained their drug operation license, they are still restricted to only the wholesale business. This separation of foreign trade from domestic trade does not comply with the principle of unity of domestic and foreign trade. We hereby suggest

that relevant government departments grant the domestic trade right to those qualified companies, particularly those traditional medicines and health product import and export companies, to engage in the domestic trade of medicines and health products.

CCCMHPIE

July 17, 2003

SELECTED DEFENDANTS' TRIAL EXHIBITS

NOTICE FOR DISTRIBUTING THE MINUTES OF THE SECOND MEETING OF CHINESE VITAMIN C MANUFACTURERS, CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS, DATED DECEMBER 21, 2001

China Chamber of Commerce of Medicines & Health Products Importers & Exporters

Notice for Distributing the Minutes of the Second Meeting of Chinese Vitamin C Manufacturers

To member enterprises of Vitamin C Sub-Committee,

Pursuant to thoughts of the Ministry of Foreign Trade & Economic Cooperation ("MOFTEC") on reforming the export regulatory system, there will be a relatively significant changes to the regulatory manner of Vitamin C exports in 2002. In order to adapt to the new situation, China Chamber of Commerce of Medicines & Health Products Importers &Exporters ("the Chamber") held two meetings respectively on November 16, 2001 and December 21, 2001 with the persons in charge of the major Vitamin C manufacturers concerning issues of the self-discipline of Vitamin C export industry in 2002. Attached are the Minutes of the Second Meeting of Chinese Vitamin C Manufacturers. Please carefully review these and provide comments, and respond to the Chamber by December 29, 2002. If there are no comments, please implement in compliance with these Minutes.

The Chamber hereby makes this notice.

Attachment: the Minutes of the Second Meeting of Chinese Vitamin C Manufacturers

China Chamber of Commerce of Medicines & Health Products Importers &Exporters

(Seal)

December 25, 2001

Minutes of the Second Meeting of Chinese Vitamin C Manufacturers

On December 21, 2001, China Chamber of Commerce of Medicines & Health Products Importers & Exporters held a meeting with the heads of the Northeast Pharmaceutical General Factory, Jiangsu Jiangshan Pharmaceutical Co., Ltd., Shijiazhuang Pharmaceutical Group and Weisheng Pharmaceutical Co., Ltd., and Hebei Welcome Pharmaceutical Co. Ltd. at the Hua Yao Plaza in Shijiazhuang to discuss issues relating to Vitamin C exports in 2002. Zhang Changxin, Vice Chairman of the Chamber and Qiao Haili, Director of Western Medicine Department and Secretary-General of the Vitamin C Sub-Committee attended this meeting. This meeting was presided over by Qiao Haili.

Pursuant to MOFTEC's thoughts on reforming the export regulatory system, there would be relatively significant changes in the regulatory manner concerning Vitamin C exports in 2002. In order to adapt to the new situation, the Chamber held a meeting on November 16, 2001 with the heads of the major Chinese Vitamin C manufacturers, during which they agreed upon issues regarding the industry self-discipline for Vitamin C export. Specifically, each Chinese Vitamin C manufacturer shall export

Vitamin C in 2002 according to the export volume respectively committed by each of them. This meeting reached the following resolutions on the relevant specific issues relating to the implementation of the vitamin C industry self-discipline in 2002:

1. *The committed export volume as part of the industry self-discipline shall be strictly implemented.* From January 1, 2002, the Vitamin C products that are and declared at the customs for export by the aforementioned manufacturers shall be respectively recorded into the total export volume of each of such manufacturers; the volume of Vitamin C products declared for export by the import and export companies based on outright purchase or agency arrangements with the above-mentioned manufacturers, upon confirmation by the respective manufacturer, shall be accordingly recorded into the total export volume of such manufacturer. This work is crucial for the implementation of the self-discipline for Vitamin C export industry in 2002, and each import and export company shall actively co-operate and co-ordinate with the manufacturing companies with regard to their confirmations. Those import and export enterprises that are not in strict compliance with this requirement will be punished by Vitamin C Sub-Committee.

2. *Exports shall be balanced*. While all the Vitamin C manufacturers agreed to strictly control the export volume, it is imperative to keep the balance of the export. Such balance shall be implemented based on the average monthly export volume (including the export volume declared by the foreign trade companies through outright purchase or agency arrangement) of each manufacturer. To deal with any exceptional situations temporarily appeared in the market, each Vitamin C manufacturer is

allowed to have some additional export volume within the whole year apart from its average monthly export volume, with 200 tons for Northeast GPF, 150 tons for Jiangsu Jiangshan, 150 tons for Shijiazhuang Pharmaceutical Group and Weisheng, 130 tons for Hebei Welcome. However, at the end of the year the total export volume shall not exceed the total export volume committed by each manufacturer.

3. *A "Special Chop for the Export Contract"* will be used. Each Vitamin C manufacturer shall make such chop and use it on supply contracts with import and export enterprises from January 1, 2002.

4. *To punish any violations.* With respect to the Vitamin C manufacturers with violations of using disguised low prices or exporting beyond given volume, etc, when confirmed upon investigation, a penalty will be imposed on the violating manufacturer. Namely, five times of the export volume that is in violation shall be deducted from the total allocated export volume of the violating manufacturer. Penalties applicable to the violating foreign trade companies are to be formulated.

5. An industry self-discipline inspection group shall be formed, with the Secretary-general of Vitamin C Subcommittee as the leader, and each Vitamin C manufacturer will designate one mid-level officer as member.

THE ADMINISTRATIVE RULES OF THE VITAMIN C SUBCOMMITTEE, CHINA CHAMBER OF COMMERCE OF MEDICINES AND HEALTH PRODUCTS IMPORTERS AND EXPORTERS, APPROVED JUNE 7, 2002

China Chamber of Commerce for Import & Export of Medicines & Health Products VC Subcommittee

List of members (member organizations) of the Vitamin C Subcommittee Council, China Chamber of Commerce for Import & Export of Medicines & Health Products

Chairman of the Council:	Qiao Haili (also assuming the position of) Director of Western Medicine Department at China Chamber of Commerce for Import & Export of Medicines & Health Products
Member Organizations:	Northeast General Pharmaceutical Factory Import and Export Company
	Jiangsu Jiangshan Pharmaceutical Co., Ltd.
	Weisheng Pharmaceutical (Shijiazhuang) Co., Ltd.
	Hebei Welcome Pharmaceutical Co., Ltd.
Secretary General:	Qiao Haili (also assuming the position of) Director of Western Medicine Department at China Chamber of Commerce for Import & Export of Medicines & Health Products

Deputy Secretary General:	Wan Ning, Western Medicine Department at China Chamber of Commerce for Import & Export of Medicines & Health Products

List of member enterprises of the VC Subcommittee of CCCMPIE

1. Northeast General Pharmaceutical Factory Import and Export Company
2. Jiangsu Jiangshan Pharmaceutical Co., Ltd.
3. Weisheng Pharmaceutical (Shijiazhuang) Co., Ltd.
4. Hebei Welcome Pharmaceutical Co., Ltd.
5. Shanghai Medicines & Health Products Import & Export Corporation
6. Shanghai Sunve Pharmaceutical Co., Ltd.
7. Shijiazhuang Pharmaceutical Group Import and Export Trading Co., Ltd.
8. Jiangxi Medicines & Health Products Import & Export Corporation
9. Sinochem Hebei Import and Export Corporation
10. Anhui Chemicals Import and Export Co., Ltd.
11. Shandong Medicines & Health Products Import & Export Corporation
12. Hebei Medicines & Health Products Import & Export Corporation
13. Jiangsu Medicines & Health Products Import & Export (Group) Corporation

14. Zhuhai Baifuli Trade Development Co., Ltd.

15. Shandong Zibo Hualong Pharmaceutical Co., Ltd.

The Administrative Rules of the VC Subcommittee, China Chamber of Commerce for Import & Export of Medicines & Health Products

Chapter One General Principles

Article One *The Administrative Rules of VC Subcommittee of CCCMHPIE* is formulated in accordance with the relevant state laws, regulations and the *Bylaws of China Chamber of Commerce for Import & Export of Medicines & Health Products.*

Article Two The name of this organization is VC Subcommittee of China Chamber of Commerce for Import & Export of Medicines & Health Products (referred to as "the Subcommittee" hereafter), and is registered with the state's administrative organ for associations in accordance with the law.

Article Three The Subcommittee is a component of China Chamber of Commerce for Import & Export of Medicines & Health Products (referred to as "the Chamber of Commerce" hereafter), and is a self-disciplinary trade organization jointly established on voluntary basis by members of the Chamber of Commerce engaging in vitamin C import and export business. It does not have the status of a legal person.

Article Four The purpose of the Subcommittee is to: observe the state laws, regulations and the bylaws of the Chamber of Commerce, coordinate and guide vitamin C import and export business as well as relevant activities

and provide consultancy and services to members and governmental departments, maintain the normal order of vitamin C import and export activities, and protect fair competition, protect the national interests and the legal rights and interests of members, and promote healthy development of vitamin C import and export trade.

Article Five The Subcommittee accepts guidance and supervision from the Chamber of Commerce.

Chapter Two Functions

Article Six The Subcommittee plays the role of bridging and connecting between the government and the members, between tbc domestic and overseas markets. and between the relevant industries.

Article Seven The Subcommittee introduces the state economic and trade laws. regulations, guidelines and policies to the members, and guides and supervises the members to operate their businesses in accordance with the law.

Article Eight The Subcommittee coordinates and guides vitamin C import and export activities, promotes self-discipline in the industry, maintains the regular order of vitamin C import and export operations, and protects the interests of the state, the industry and the members.

Article Nine The Subcommittee studies methods and measures for expansion of vitamin C import and export trade, and organizes discussions about strategy and planning of import and export trade. The Subcommittee represents the interests of the members, inform relevant government departments of members' status, opinions

and suggestions, and makes suggestions to relevant government departments as the government makes policies concerning vitamin C import and export trade.

Article Ten The Subcommittee participates in domestic and overseas activities and international exchanges for promotion of vitamin C import and export, establishes and develops cooperative relationship with the domestic and international industrial organizations of the same nature, and helps members explore the international market.

Article Eleven The Subcommittee exchanges experiences with regard to developing vitamin C production, improving quality, improving operation and management, and promoting the integration of industry and commerce, collects and sorts relevant information about domestic and overseas VC markets, clients, production and sales, and provides consulting service to members.

Article Twelve The Subcommittee organizes relevant enterprises to respond to dumping accusations by foreign countries against vitamin C of our country; makes investigations into dumping or unfair competition activities of foreign products in our country that are reported by members, and request governmental departments to take measures according to the requirements of the industry.

Article Thirteen The Subcommittee implements other duties authorized by the government or the Chamber of Commerce, requested by members, or entrusted by trade agreement.

Chapter Three Member

Article Fourteen The following requirements must be met to apply for membership of the Subcommittee;

(1) Be a member of China Chamber of Commerce for Import & Export of Medicines & Health Products:

(2) Support this document;

(3) Be willing to engage in vitamin C import and export business and operate in accordance with the law;

(4) Have the intention to join the Subcommittee.

Article Fifteen Procedures for joining the Subcommittee:

(1) Submit application for joining the Subcommittee;

(2) Submit documents of registration with relevant regulatory departments of the state;

(3) The Subcommittee reviews the application according to aforementioned requirements, approves those who meet the requirements for joining the Subcommittee, and processes paperwork for registration.

Article Sixteen Rights of Members:

(1) The rights to elect, to be elected and to vote at the Subcommittee;

(2) Participate in various activities organized by the Subcommittee;

(3) Enjoy various services provided by the Subcommittee;

(4) Bring forth opinions, suggestions and proposals about relevant issues involving import and export;

(5) Bring forth opinions, suggestions and proposals on relevant issues involving the Subcommittee;

(6) Monitor the work of the Subcommittee, and bring forth opinions and suggestions about it;

(7) Expose enterprises and individuals who violate the state laws, regulations and policies, or provisions of this document, disobey the coordination of the Subcommittee. or damage the interests of the state or other members;

(8) Freedom to withdraw from the Subcommittee.

Article Seventeen Member's Obligations:

(1) Observe the *Administrative Rules* of the Subcommittee;

(2) Carry out resolutions and agreements of the Subcommittee;

(3) Actively participate in various activities organized by the Subcommittee;

(4) Complete work entrusted by the Subcommittee;

(5) Keep the Subcommittee informed by providing relevant information. materials and data;

(6) Accept coordination by the Subcommittee.

Article Eighteen A member shall inform the Subcommittee in writing of withdrawal from the Subcommittee, return relevant certificates related to membership, and process paperwork for membership cancellation.

Article Nineteen The Subcommittee will discipline members engaging in the following activities:

(1) Violate provisions of this document;

(2) Failure to carry out resolutions of the Subcommittee;

(3) Failure to carry out industrial agreements;

(4) Violate the state laws, regulations and rules in its business activities;

The disciplinary actions of the Subcommittee include: circulation of notice of criticism, issuance of warning, temporary suspension of membership, or cancellation of membership. Punishment must be approved by the Council of the Subcommittee (referred to as "the Council" hereafter).

Article Twenty The Subcommittee requires periodical member registration, and the time and content for registration will be determined by the Council. Failure to register within the defined time frame will result in automatic loss of membership.

Chapter Four Organizational Structure

Article Twenty-One The general meeting of the Subcommittee (referred to as "the General Meeting" hereafter) is the highest authority of the Subcommittee.

Article Twenty-Two The General Meeting exercises the following duties:

(1) Make decision on the work guideline and tasks of the Subcommittee;

(2) Formulate, review, and amend the *Administrative Rules* of the Subcommittee;

(3) Formulate, review, and amend the important policies and rules of the Subcommittee;

(4) Review the work report of the Council;

(5) Elect and dismiss Council members of the Subcommittee;

(6) Elect and dismiss members of the investigation team of the Subcommittee;

(7) Review proposals of the Council and the members;

(8) Make decisions on issues of termination;

(9) Make decisions on other important issues.

Article Twenty-Three The General Meeting is held once every year, and can be held in advance or postponed under special circumstances, upon approval by the Council through voting or upon a proposal brought forth by more than one half of the members.

Article Twenty-Four Upon a proposal jointly brought forth by one third of the members or by more than one half of the Council members, or upon a request by the government department in charge, an interim General Meeting may be held.

Article Twenty-Five The Interim General Meeting exercises the following duties:

(1) Review proposals by the Council or by the members;

(2) Formulate specific coordination plans;

(3) Coordinate other issues related to the work of the Subcommittee.

Article Twenty-Six The General Meeting or the interim General Meeting can be held only when two thirds of the members are attending. Resolutions of the Meeting are valid only when they are approved through voting by more than two thirds of the attending members.

Article Twenty-Seven A Council is set up in the Subcommittee. The Council is the executive body of the General Meeting, performs the routine work of the Subcommittee when the General Meeting is not in session, and reports to the General Meeting. The Council exercises the following duties:

(1) Carry out resolutions of the General Meeting and the interim General Meeting;

(2) Elect and dismiss the chairman, the deputy chairman, the secretary general and the deputy secretary general;

(3) Guide the routine work of the Subcommittee;

(4) Prepare for convening the General Meeting or the Interim General Meeting;

(5) Submit work report to the General Meeting;

(6) Organize and coordinate the specific implementation of plans;

(7) Admit enterprises into the Subcommittee;

(8) Receive, review and respond to proposals by members;

(9) Accept the arbitral decisions made by the investigation team of the Subcommittee, and penalize members in violation of the rules;

(10) Carry out other duties authorized by the government or the Chamber of Commerce, or entrusted by the General meeting.

Article Twenty-Eight The term of each Council is four years. Upon completion of the term, the General Meeting shall be held to elect a new Council. When the General Meeting is postponed or is held ahead of the scheduled time, the beginning and end of the Council's term will be defined accordingly.

Article Twenty-Nine The list of candidates for the new councils of the Subcommittee and how the Council will be produced will be proposed after the Council responsible for preparation for the General Meeting have collected input from all members in writing. The Council is democratically elected by the General Meeting, and the Council Members must be a member of the Subcommittee. Council members can be reelected.

Article Thirty The Council holds two meetings every year, which are called and presided by the Council chairman. When the Council Chairman thinks it necessary, an interim Council meeting may be called after seeking opinions from Council members, or when it is proposed by more than one half of the Council members. Under special circumstances, the meeting can be held by way of telecommunications.

Article Thirty-One The Council meeting can be held only when more than three quarters of Council members are attending. The resolutions thereof are valid only when they are voted on and approved by more than two thirds of the attending Council members.

Article Thirty-Two An investigation team is set up in the Subcommittee. The investigation team is the supervisory organ of the Subcommittee, and reports to the General Meeting of the Subcommittee.

Article Thirty-Three The investigation team of the Subcommittee exercises the following functions and powers:

(1) Monitor and implantation of the *Administrative Rules* of the Subcommittee and of various resolutions of the Subcommittee;

(2) The head of the investigation team is concurrently held by the secretary general;

(3) Receive reports from members of the Subcommittee on violation of the state laws, regulations, the *Administrative Rules* or resolutions of the Subcommittee, and carry out investigations accordingly;

(4) Organize inquiries of the violating members;

(5) Vote to arbitrate member activities to decide whether or not they are violations;

(6) Submit work report to the General Meeting of the Subcommittee;

(7) Submit arbitral decision on violations to the Subcommittee Council;

(8) Carry out other duties entrusted by the General Meeting of the Subcommittee or required by trade agreements.

Article Thirty-Four The term of the investigation team is the same as the Council, and a new team shall be elected along with the Council. Members of the investigation team are democratically elected by the General Meeting, and can only be produced from members of the Subcommittee. Members of the investigation team can be reelected. A member of the investigation team cannot be concurrently a Council member (Chamber of Commerce staff are exceptions).

Article Thirty-Five The investigation team of the Subcommittee does not hold regular meetings, and a meeting will be convened by team director based on circumstances and needs.

Chapter Five Leadership

Article Thirty-Six The Subcommittee has one Council chairman, one deputy chairman, one investigation team director, one secretary general, and one deputy secretary general.

Article Thirty-Seven The chairman and the deputy chairman are produced through democratic election by the Council with a one-year term, and can be reelected. The chairman can only be elected from the representatives of the member organizations of the Council.

Article Thirty-Eight The term of the director of the investigation team is one year, and can be reelected.

Article Thirty-Nine The deputy chairman of the Council, the secretary general, and the deputy secretary general of the Subcommittee are positions assumed by personnel of the permanent administrative body of the

Chamber of Commerce. Chairman of the Chamber of Commerce nominates candidates for deputy chairman of the Council, secretary general and deputy secretary general of the Subcommittee who are then voted on by the Council. Their terms are the same as the rest of the leadership as mentioned before. The secretary general can be reelected.

Article Forty Duties of the Council Chairman

(1) Convene and preside over the Council meetings;

(2) Represent the Subcommittee to the external world, and represent the Subcommittee in signing relevant important documents;

(3) Take charge of the work at the Subcommittee and the Council;

(4) Inspect the implementation of resolutions of the General Meeting and the Council;

(5) Report to the General Meeting and brief the latter on his or her work.

Article Forty-One The deputy chairman assists the chairman; and when the chairman cannot perform his/her duties for some reason, the deputy chairman shall work in the chairman's capacity.

Article Forty-Two Duties of the Director of the investigation team:

(1) Convene and preside over meetings of the Subcommittee investigation team;

(2) Take charge of the work of the investigation team;

(3) Inspect the implementation of the investigation team's decisions;

(4) Report to the General Meeting and brief the latter on the team's work.

Article Forty-Three Duties of the Secretary General

(1) Carry out resolutions of the General Meeting and the Council, and organize to implement the Subcommittee's work plans;

(2) Assist the chairman and deputy chairman of the Council;

(3) Take charge of the routine secretary and liaison work at the Subcommittee;

(4) Take charge of the management of routine meetings of the Subcommittee;

(5) Recruit staff for the Subcommittee based on the needs of the Subcommittee;

(6) Carry out other duties entrusted by the General Meeting, the Council, the investigation team, the chairman of the Council and the director of the investigation team.

Article Forty-Four The deputy secretary general assists the secretary general; and when the secretary general cannot perform his/her duties for some reason, the deputy secretary general shall work in the capacity of the secretary general. The deputy secretary general attends the Council meeting as a nonvoting delegate.

Chapter Six Procedure for Amendment of the *Administrative Rules*

Article Forty-Five These *Administrative Rules* can be amended only when a motion for amendment is put forward by one half of the Subcommittee members or two-thirds of the Council members.

Article Forty-Six The amended version of the *Administrative Rules* must first be voted on and approved by the Council before being submitted to the Chamber of Commerce for review.

Article Forty-Seven The amended *Administrative Rules* must be approved by the General Meeting. Once approved, it must be submitted to the Chamber of Commerce for review. It takes effect upon approval by the Chamber of Commerce.

Chapter Seven Termination Procedure

Article Forty-Eight When the Subcommittee needs to be cancelled for reasons such as the completion of purpose, voluntary dissolution, division, or merging, the Council shall put forward a motion for termination.

Article Forty-Nine The motion for termination put forward by the Subcommittee must be approved through voting by the General Meeting. It then must be reviewed and approved by the Chamber of Commerce and the overseeing department of the Ministry of Foreign Trade and Economic Cooperation.

Article Fifty The Subcommittee will be terminated upon completing paper work for cancellation with the state regulatory organ for associations.

Chapter Eight Supplementary Articles

Article Fifty-One The Subcommittee shall have no independent financial department, and fund needed for operation will be collected and expended by the Subcommittee itself.

Article Fifty-Two In order to monitor the implementation of self-disciplinary agreements within the industry, the coordination plans or resolutions of the industry, the Subcommittee—with members' consensus—can collect a certain amount of guarantee deposit for breach of contract. The specifics of collection expenditure will be separately formulated by the Subcommittee General Meeting, the Interim General Meeting or the Council.

Article Fifty-Three The *Administrative Rules* was voted on and approved by members on June 7, 2002.

Article Fifty-Four The Subcommittee Council will have the authority to interpret the *Administrative Rules.*

Article Fifty-Five The *Administrative Rules* takes effect on the day when it is approved by the Chamber of Commerce.

EXCERPTS FROM THE TRANSCRIPT OF TRIAL PROCEEDINGS HELD IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

EXCERPT OF PROCEEDINGS BEFORE THE EASTERN DISTRICT OF NEW YORK, FEBRUARY 25, 2013

[1]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-MD-1738

IN RE

VITAMIN C ANTITRUST LITIGATION,

Plaintiff,

-against-

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Defendant.

United States Courthouse
Brooklyn, New York

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE BRIAN M. COGAN
MAGISTRATE JUDGE JAMES ORENSTEIN
UNITED STATES DISTRICT JUDGE, and a jury.

[3](The following was held before Judge Cogan.)

THE CLERK: In Re: Vitamin C Antitrust Litigation. Docket number M6-01738.

Counsel, state your appearances starting with the plaintiffs.

MR. ISAACSON: Lloyd Isaacson for the plaintiffs, Your Honor.

MR. SOUTHWICK: James Southwick, Susman Godfrey for plaintiffs.

MS. CHUTKAN: Tania Chutkan, Boies, Schiller & Flexner for plaintiffs.

MR. MASON: Good morning, Your Honor. Dan Mason for Weisheng Pharmaceutical and China Pharmaceutical Group.

MR. BUETZOW: Good morning, Your Honor. Eric Buetzow for China Pharmaceuticals.

MR. CRITCHLOW: Good morning, Your Honor. Charles Critchlow for Hebei Welcome Pharmaceutical and North China Pharmaceutical Group.

MR. PRESCOTT: Good morning. Daniel Prescott also for Hebei Welcome and North China Pharmaceutical Company.

MR. SEROTA: And James Serota for Northeast Pharmaceutical.

MS. STILLMAN: And Catherine Stillman for Hebei Welcome Pharmaceuticals and North China Pharmaceutical Group.

THE COURT: Okay. Before you go ahead with [4]Judge Orenstein and select a jury, based on the not at

all atypical flurry of activity over the weekend leading up to the trial, there are a couple of observations I wanted to pass on to you.

I know the defendants have been chafing at the Rule 44.1 decision that I made and I understand their concerns about what issues will be tried to the jury and what issues I decided over their objection including the resolution of certain factual matters in the context of the 44.1.

What I wanted to emphasize to everyone is we are not redoing the 44.1 in this trial. I understand defendants have an issue with what I did. I believe I was entitled and indeed obligated to do it, and this trial is not going to be effectively a reargument before the jury of those determinations.

Having said that, it is possible that because of the issues that will clearly have to be tried to the jury, for example, the plaintiff has to prove a prima facie case to get to the jury, maybe they won't. They have to prove injury in fact to the plaintiffs. They have to prove damages. But in the course of doing that, there may be things that touch upon or overlap my ruling on the 44.1 issues and, like I said, we're not rearguing that motion, but if that does happen, I want everyone particularly the defendants to be on notice that depending on how we decide to charge the jury and the form of [5]verdict that we use at the end, it may be that I determine to treat certain determinations by the jury as advisory rather than binding.

Obviously, that won't be the case on damages and other necessary elements of the plaintiff's case, but if there is an overlap with the 44.1 decision, everyone should know that's a possibility.

Now, I just received a letter saying that the parties are in disagreement over what exhibits can be shown to the jury during openings. I'm a little surprised at that. It's a little unusual in a case like this to show exhibits to a jury during openings. It's one thing if you have a contract case and you put the contract up during your opening. That's one thing. With all the little pieces here, I'm not sure it's advisable but I will let the parties proceed how they think best.

I have made a lot of rulings on what exhibits can be admitted and what exhibits cannot be admitted before this jury. It seems to me to the extent I ruled an exhibit is admissible, then if the party really wants to, they can show that exhibit to the jury. If I ruled that it's inadmissible, then they cannot.

As to those I think comparatively small volume of exhibits on which I have not yet ruled, but which I think I've given the parties some additional guidance by suggesting that [6]I'm not rearguing the 44.1 ruling in front of this jury, as to those exhibits, it seems to me you take your chances, just like telling a jury what a witness is going to testify to. If, in fact, that witness' testimony is not allowed, your adversary is going to point that out on closing, that you made certain promises about what a witness would testify to and a witness did not testify. If you refer to an exhibit in front of the jury that I determine to be, in the course of a trial is inadmissible, then no doubt your adversary is going to point out that no such evidence was presented as promised during the opening statements.

So that's as much guidance that I'm willing to give as far as the substantial amount of rulings that I've made on other exhibits prior to today.

The only other thing I would say about opening statements is that please do not object during your adversary's opening statement unless you really feel that at that moment, you must make a correction that is so irreparable, if it goes uncorrected, that effectively you're moving for a mistrial.

I will give you the opportunity after your adversary completes their statement to come to side bar and tell me what you think should be stricken from that and if I think it's appropriate, I will tell the jury that that should not be 25 considered at that point. The jury, of course, is getting an [7]instruction in opening statements, closing statements and attorneys' comments and generally are not binding on them and are indeed not evidence to be taken into account by them, so it seems to me unnecessary but I don't want repeated interruptions of opening statements to the extent that we can avoid those.

All right. Anything further before we get Judge Orenstein?

MR. MASON: Your Honor, may I just address briefly the comments the Court has made on the 44 rule?

THE COURT: You may.

MR. MASON: Thank you, Your Honor.

Your Honor, I'm Dan Mason for Weisheng China Pharmaceuticals. I don't address the Court here to argue anything, but I want to make sure that I follow and

understand what Your Honor is saying and maybe it's not inconsistent but I don't want to, I just want to make sure.

At the July 12th status conference at the hearing, you said at page seven the following.

The plaintiffs recognize and I think I recognized at the time and I certainly recognize now that there are factual issues surrounding the determination of where the Chinese law actually precluded the defendants from doing anything but fixing the price of the vitamin C so there are things for the jury to determine and I'm going to let you present that stuff [8]to the jury. I am not going to say, oh, that's precluded by my summary judgment decision and so you have, we're the defendants, relatively free reign in presenting what seemed to be an essentially duress offense to the jury.

I read that and I took that and I do take it and I think what Your Honor said is correct. I don't want to waive any other points you've made. That still stands and that I can proceed, the defendants can proceed under that understanding. And that nothing Your Honor said this morning is inconsistent or you haven't changed your mind or going in some other direction.

I don't do this to argue because I know we've done a lot of that. I just want to make sure that I'm following the Judge's direction.

THE COURT: I appreciate that. Your remark is totally appropriate.

I have not changed my mind from that. There is a sliver of duress that my understanding is will be presented before a jury. When I say a sliver, I mean the space

between my decision and a jury's full out determination of what Chinese law allowed which we're not going to do.

We are, my understanding is, trying essentially a duress offense and I will let you go ahead and try that. So I'm not changing my mind on that.

MR. MASON: Okay. But as I understand it, you have [9]said that we can refer to Chinese regulation to the extent they were the documents that compelled the defendants to do what they did, Mr. Qiao Haili is going to testify about these things.

THE COURT: I expect Mr. Qiao will make reference to certain regulations and directives. That does not mean the directives and regulations come into evidence or if they do, and I'm not deciding this now, it will be with an instruction to the jury that they are for the limited purpose of explaining Mr. Qiao's testimony, not in establishing what the law of China is.

MR. MASON: Okay. And I appreciate that.

THE COURT: Okay.

MR. MASON: This one final point. Do I understand or do I correctly understand Your Honor's comments with regard to opening statements and exhibits, that counsel can refer to what they want that has not been precluded and we take our chances as to whether you agree or not, but there's not going to be any objection during opening statement that you can't use it?

THE COURT: Yes. That's the way I would like to proceed.

Is your opening statement really that heavily dependent on the documents?

MR. MASON: Not at all.

[10]THE COURT: I wouldn't expect it would be.

MR. MASON: I just want to make sure, again, I don't violate any rules or expectation Your Honor has.

THE COURT: No. I appreciate your concern and we recognize the way this trial has come about, it's kind of a delicate balancing act and everyone is going to do their best to walk along the mountaintop that we're on here.

MR. MASON: Thank you.

MR. ISAACSON: Your Honor, just so you're not surprised by the opening statement and we're talking without mentioning certain exhibits that are at issue, plaintiffs have some business documents they're going to present and we can adjust to your statements without any problem.

Defendants have two exhibits that they want to show, one of which is one of the regulations. They want to show that in opening to the jury. And the other is a document that was produced a week ago. It's some sort of identification card from Mr. Qiao Haili that has the Ministry of Commerce's name on it. It was produced a week ago. We weren't --

THE COURT: Does it matter now? Is there any question he had an ID card when he worked for the government?

MR. ISAACSON: I would have liked to have asked him questions about it too because we didn't understand

the card and we were denied that opportunity. It was not part of the proffer.

[11]THE COURT: All right. On the regulation, again, I leave it to Mr. Mason to decide whether he wants to show it to the jury. If it doesn't come into evidence, and I think it either won't or it will for a very limited purpose, then you can talk to the jury about it if there's no such evidence in front of them and, of course, we will get a question from the jury during deliberations can we please get a copy of the regulations which I will say no.

As to the ID card, what's the sore story on that, Mr. Mason?

MR. MASON: I'm holding it in my hand. This was from Mr. Qiao. It wasn't a part or defendants didn't have it. They never asked for it. They deposed him for two days. It's an ID card and if you want, Your Honor, I can give it to the clerk.

THE COURT: Why is it significant to your case?

MR. MASON: Because it shows he's a member of the Ministry of Commerce and he's a part of the government.

THE COURT: Is there any dispute about that?

MR. MASON: Yes, there is.

MR. ISAACSON: Yes, there is.

THE COURT: I see.

MR. MASON: They never asked for this.

THE COURT: But who would ask for that?

MR. ISAACSON: That's not even true.

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EXCERPT OF THE OPENING STATEMENT OF DANIEL S. MASON, ESQ., FOR WEISHENG PHARMACEUTICAL CO., LTD., FEBRUARY 25, 2013

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[211]What occurred with regard to self discipline then was this concept that the Chinese also called industry coordination and industry coordination simply is that the individual companies in that industry are required to coordinate their pricing and product limitations.

[212]The testimony in this case will be entirely consistent with that and when you see a document in isolation, the name of the document will say -- and he's going to show some, there's no doubt, we agree -- we, the defendants -- agree to this price. He's going to say that the plaintiff will say, hey, it didn't say there if you don't agree you're going to be compelled. It's interesting that one of the witnesses in this case, and counsel mentioned Ms. Huang (ph), she's the former sales manager, he compared the relationship between Mr. Qiao and the Chamber to a parent and his or her child. You have a young child at home and the parent decides that that child is watching too much television a week, and the parent said to the child you're going to watch six hours of TV a week or whatever it is. You come to me and you tell me how you want to do that. I want to watch two hours on Tuesday night, four hours on Saturday, or some combination. Well, is that voluntary that the child does that? Does the child say, well, I'm volunteering to do this? Of course not. Similar in this situation. The act the Chinese government was trying to accomplish, which is limiting competition, was done in a similar way. You know the marketplace. We have

to accomplish this goal, we have to restrict competition because that is what the government wants. We are going to give you – that is the government is telling the manufacturers in the first instance you decide how you want to do it, and if we like [213]that, and we accept that, then we will. Because you guys are in the marketplace you know the market. Mr. Qiao doesn't spend all his time on Vitamin C. He has other companies -- other industries to deal with, too, but if you don't do it, I'm going to make you do it, and if I make you do it and you don't listen to me there's going to be sanctions. There's going to be penalties. Excuse me. That's what the evidence in this case will show you.

Can you put up number 28, please, for a moment.

We have four. So, again, I don't want to show you hundreds of documents at this point but I do want to show you this one. This is a document -- I am not going to characterize it, it is just a document from the government, and it talks about to punish any violation and in this one they're saying and I'm paraphrasing, and you ask read it for yourself, but they're basically saying: If you don't do what we tell you, a penalty will be imposed on you. The penalty in this case is five times the export volume. It is a violation, shall be deducted from the allocated export volume. What does that mean? The Chinese government tell us you, can sell X pounds or X kilos of Vitamin C to the United States. That is all you can do, but if you violate what we tell you, we are going to cut you back. You can't sell that much. So it's a violation. Is this voluntary? It is the government document. Showed you a lot of documents, didn't show you any of these. I think it's [214]important that you understand the source of the authority that Mr.

Qiao comes with. Vitamin C has been regulated by the Chinese government for 25 years and there were a whole bunch of regulations that Mr. Qiao will explain to you and these were regulations issued by the Ministry of commerce, the highest level of trade of the government trade agency in China and his authority also stems from being the director of a China Chamber of Commerce, the Medical and Health Product Import and Export which counsel referred to and when you see his card it is on his card. And Mr. Qiao also formed within the Chamber of Vitamin C subcommittee group and he did that pursuant to the government's directive.

Now, counsel didn't mention the Vitamin C subcommittee. He had the Ministry of Congress up here. They were like the big government agency on trade and commerce for the entire Peoples Republic of China and under that he had they call these chambers, and they were the chamber for Vitamin C. Could have been chambers or industries, too, but they were chambers for Vitamin C, and there was a guy who was put in by the government and his job was to regulate industry members in that chamber, in this case Vitamin C, and then Mr. Qiao was in the chamber specifically formed as Vitamin C subcommittee group and members of the subcommittee group were the manufacturers. They had to become a member if the wanted to have export.

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EXCERPTS OF THE DIRECT EXAMINATION OF WANG QI OF JIANGSU JIANGSHAN PHARMACEUTICAL CO., FEBRUARY 26, 2013

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[315]Q Let's move to June 2003.

Exhibit 136 -- no. I'm sorry. Exhibit 78.

[316]Is Exhibit, Exhibit 78 a monthly report for June 2003 that you delivered on July 6, 2003?

THE INTERPRETER: Did you say July 6th?

MR. ISAACSON: Yes, July 6th at the end of the memo.

THE INTERPRETER: 78, right?

MR. ISAACSON: Yes. June summary.

THE INTERPRETER: Yes, but the date is August 7th.

MR. ISAACSON: On page three at the bottom? He should be looking at the Chinese, in any event. I see 7/6.

THE INTERPRETER: Oh, yes. Two reports stuck together.

MR. ISAACSON: I'm sorry. I apologize for that. We're just going to look at the first one.

A Yes, I must have written this one myself.

MR. ISAACSON: All right. I would move to admit Exhibit 78, the June work summary, into evidence.

MR. MASON: Fine.

THE COURT: 78 is admitted.

(So marked.)

(Exhibit published.)

Q Now, in item five, you discussed a Chamber of Commerce meeting, correct?

A Yes.

Q And you recorded on June 11th your company organized a meeting on market analysis among six domestic manufacturers [317]and the Chamber, is that right?

A That's what's written here.

Q And you also recorded that we all agree, meaning the participants, to set the floor price at $9.20 USD per kilogram.

A Yes, that's what's written here.

Q And your hope, you recorded, was to slow down the speed of the market price of vitamin C falling, is that right?

A Yes, that's what's written here.

Q No one from the ministry -- did you attend this meeting?

A I did participate in the meeting in Ging Dao, but whether it was this one, I don't remember.

Q And you recorded that the agreement to set the floor price at $9.20 per kilogram, the effect of that was very limited, is that right?

A Yes. It is what is written here.

Q While -- and you recorded that while there was agreement at the meeting, every manufacturer was quoting prices lower than the floor price that was agreed?

A That's what's written here.

Q All right. The vitamin C companies felt free to quote prices lower than the agreed floor price, is that right?

A Whether it's allowed to report under the price, limit price is not related to this record.

[318]DIRECT EXAMINATION CONTINUED

BY MR. ISAACSON:

Q My question was Vitamin C company felt free to quote prices lower than the $9.20 agreed for by --

A There was still a lot of limitations.

Q My question was the companies felt free to quote less than $9.20 per kilogram, didn't they?

A From what I understand from the record and what is written here, my understanding is there was some actions taken by the manufacturers of doing that, but whether there was an agreement there that they were allowed to do that, that is different.

Q You don't recall anyone being punished for quoting prices less than $9.20 per kilogram, do you?

A I don't remember clearly.

Q And other than what you wrote here, you don't remember what was discussed at the June 2003 meeting?

A I cannot remember clearly.

Q Let me ask you to go to the next one, July 2003 Exhibit 53. Exhibit 53, this is a memo you prepared of Vitamin

C subcommittee meeting -- excuse me -- that you dated August 8, 2003 for meeting on July 26th; is that correct?

A What exhibit is that?

Q Fifty-three.

A Oh, 53 (perusing). Yes, I did write that.

[319]MR. ISAACSON: Move to admit Exhibit 53.

MR. MASON: No objection.

THE COURT: Received.

(Exhibit 53 so marked)

Q Now, you attended this meeting correct, sir?

A I did attend.

Q Let me ask you about your meeting summary. There were some remarks about item three about what Mr. Chow Hili had to say?

A That is what I recorded.

Q And in the third bullet you recorded a question: Did he ask the companies can each producer take turns to stop production for maintenance and repairs question mark.

A Just what is recorded here.

Q In the next bulletin he discussed a targeted price level; is that right, and you recorded that he said it shall neither incur an anti-dumping lawsuit, nor give profit room for western producers, nor cause additional domestic investment; is that correct?

A This is what was recorded was what he said at the time.

Q Do you recall that he suggested that prices should -- that the target price level should not be so low as to incur an anti-dumping lawsuit?

A If that is what is written.

Q And do you recall that he also said prices should not be [320]too high as to provide profits for European producers or cause additional domestic investments?

A That's what's written.

Q And the targeted price level, that's the discussion of the minimum price for verification and chop; is that correct?

A I'm not sure whether what is said here, the target pricing level, it is the same as the minimum price level that you stated.

Q Now, you also recorded some remarks by general manager Kong; is that right? That's your general manager?

A Correct.

Q And general manager Kong said at the meeting you recorded with regards to the export restricted price of U.S. dollars $9.20 per kilogram, it is cancelled as of today?

A That's what's recorded here.

Q He, Mr. Kong, announced the cancellation?

A No, that's not what I meant. I think that is a misunderstanding. This record only indicated Qaoi Hili made this one, two, three, four comments, and then the general manager Kong also made the following two points.

Q Yes.

A This only recorded the contents of what they stated.

***

[325]Q You can look at Exhibit 138. Now, this is the January 2004 board summary you prepared and submitted on February 2nd, 2004; is that correct?

A I did write that in.

MR. ISAACSON: I move to admit 138.

THE COURT: 138 is received.

(Exhibit 138 so marked)

Q I'm going to ask you about item five in your report. Do you see where after -- there's a discussion of local prices of $8.50 at European and American markets?

A It is written.

Q All right. And next you say: Because primary domestic Vitamin C manufacturers uniformly and seriously implemented [326]strategy limited production to protect prices prior to January, do you see that, and that's a reference to the domestic Vitamin C manufacturers implementing the agreement from the Beijing meeting on December 26th; is that right?

A Yes, that means the requirements from the meeting before the interview.

Q The Beijing meeting?

A Yes, supposedly.

Q And at the end of that item you say: Some manufacturers might accept orders that are slightly lower than $9 per U.S. kilogram which will not lead to fighting for orders by lowering prices, that's what you recorded, right?

A Yes, that was recorded.

Q And you knew that from your communications with the other Vitamin C companies?

A I don't know what the circumstances were at the time, but regarding market conditions, we usually get it from the market and the users' avenue.

Q But here you knew what the manufacturers were going to do before they set the price, you knew that they might accept orders slightly lower than $9 per kilogram, right?

A This is sentence is a description of the market conditions, and for such market conditions we communicate directly with our users, our distributors.

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[356]Q Let's move to 2005. Exhibit 87.

Exhibit 87, is this an e-mail that you sent on May 22, 2005 with an attached memo you wrote of a meeting on May 19, 2005?

A Yes. Yes, I wrote this.

MR. ISAACSON: All right. I move to admit.

THE COURT: All right. That's received over objection.

(So marked.)

(Exhibit published.)

Q You attended this meeting, did you not?

A Yes.

Q And you wrote remarks by Mr. Qiao Haili on the first section, number one?

A I did.

Q And what you reported was that he said as the price is gradually decreasing, he hopes that each manufacturer will take the possibility of anti-dumping highly seriously?

A That's what's described, yes.

[357]Q And moving farther down, you recorded some remarks from General Manager Feng Zhenying?

THE INTERPRETER: Mister --

MR. ISAACSON: Feng, F-E-N-G.

A The general manager Feng.

Q Yes. Feng. He hopes that steps will be taken to stabilize the price properly such as each manufacturer reducing its production volume proportionally.

And he asked that question, right?

A I don't remember why there was a question mark either.

Q But general manager Kong responded to general manager Feng that he did not agree to the proposal of proportionally decreasing production by each manufacturer?

A Yes, what general manager Kong said here is not necessarily an answer to what was stated by general manager Feng. These are just what they said.

[358]BY MR. ISAACSON:

Q Okay.

A For example, say item number two could be an answer to what Qiao Haili said at the top.

Q And then after general manager Kong spoke about what he did not agree with you recorded proposals that were made by Huang Pin-she?

A With respect to sequence, I really don't remember who spoke first, who spoke later in sequence.

Q But at some point Mr. Huang Pin-she made the proposal you put into this memo?

A Yes, yes, that is what is written.

Q So Huang Pin-she, for example, made a proposal to use current prices for obtaining the export preauthorization stamp as the forum price to explore Vitamin C?

A That is what is stated.

Q And he also made a proposal that during July and August each manufacturer would stop fermentation for about 20 days?

A That's such a sentence here.

Q Fermentation is the method of producing Vitamin C, correct?

A Correct.

Q And in response to Mr. Huang Pin-she's proposals, Weisheng, Welcome and Jiangshan expressed that it principally agreed to proposals, right?

[359]A Yes, that's how it is described.

Q NEPG and another company said they would bring the proposal back and have their company leadership make a decision, correct?

A That is what is written here.

Q And then in terms of executing these proposals, the manufacturers would decide that when they met again in June in Shanghai?

A Well, what he stated you said was manufacturers, but manufacturers are not stated in here.

Q When it refers to Shanghai, that was an event that was an exhibition, correct?

A Correct.

Q Now, at the bottom you wrote a section on explanations?

A Yes, it is here.

Q These are your personal observations, they are not recording what happened at the meeting, correct?

A Yes.

Q Your second observation was as for the proposals for proposal shut down limitation, each manufacturer will as usual have it own calculations?

A That is what is stated here.

Q In addition, you said due to the damage to the agreement caused by Weisheng last year, does that help you remember that Weisheng pulled out of a production suspension?

[360]A Exactly what happened, I don't recall.

Q But these are your observations from the time?

A Correct.

Q Due to the damage the agreement caused by Weisheng last year you wrote, it is still an open question as to what extent the consensus made at that meeting will be implemented, right?

A That's what I wrote here.

Q You didn't know at the time whether the consensus amongst the manufacturers the agreement would work?

A But there's no agreement here. Which agreement are you referring to?

Q I'm sorry. The consensus at the meeting, you didn't know at the time whether the consensus amongst the manufacturers would work?

A But like I said, I asked him before that's no agreements described here.

Q My question is about the consensus.

You didn't know at the time whether the consensus amongst the manufacturers would work?

A I see here is like mutual understanding.

Q Fine.

You did not know at the time whether the mutual understanding amongst the manufacturers would work?

A That's what is stated here.

Q And you didn't write in your observations that anybody [361]was going to make the manufacturers go along with the common understanding?

A Nobody's going to force them.

Q You didn't write that anybody would force them to go along with the common understanding?

A Is not written here. Yes, I misunderstood the word.

Q Thank you.

We talked a couple times about the verification in chop price. Now, after you became department manager for, approximately, the next six years wasn't $3.35 the price for verification and chop?

THE INTERPRETER: I didn't hear the first part of the question counsel.

Q After you became the department manager for import-export for, approximately, the next six years wasn't $3.35 the verification and chop price?

A There ought to be some variation.

Q Well, you don't recall any time during the six years after you became a department manager where the minimum price was any higher than $3.35 per kilogram, do you?

A Yes.

Q You do. Maybe we have a double --

A Yes, there was higher price.

MR. ISAACSON: I want -- page 220 of this deposition. Now, I'm talking now to counsel.

[362]THE COURT: Before you do that, let me try to clarify. Are you saying there was a verification and chop price higher than $3.35?

THE WITNESS: From what I recall, yes.

THE COURT: All right.

MR. ISAACSON: Page 220 at the bottom line 24 continuing to the top of the next page. Are you all set?

Q Sir, at your deposition did you answer the following question and give the following answer:

Question --

THE COURT: I mean were you asked the following question and did you give following answer.

MR. ISAACSON: That is works as well.

Q (Reading): Question: You don't recall any time where the minimum price was higher than 3.35 per kilogram?

Answer: It seems to me, no.

THE COURT: Ask him were you asked that question --

Q Were you asked that question and did you give that answer?

A I don't remember what happened when I was questioned.

Q And when the minimum price for verification and chop was $3.35, the Chamber of Commerce did not care if your company sold Vitamin C at a price higher than $3.35; isn't that right?

A Correct. That is like a minimum price.

Q You were free to decide about prices above $3.35 when [363]that was the minimum price?

A Yes, when it's over they don't care.

Q When you charge prices higher than $3.35 no one ordered you to do that -- let me say no one outside your company ordered you to do that?

A We make the price quote according to the market conditions.

Q And no one ordered you outside of your company to charge prices higher than $3.35 when that was the minimum price?

A Let me figure out what you're trying to say about your question. You're talking about anybody outside the persons in charge of the company?

Q Yes.

A Meaning whether anybody outside of my company who would request my company to charge over -- more than $3.35?

Q Not request, order you, direct you to.

A No.

Q Now, there were times after -- after you had been in charge of the Import-Export Department or the manager for some years, there came a time when you and the Chinese manufacturers were charging less than the minimum price of $3.35 for export?

A It did happen like that.

THE COURT: Mr. Isaacson, at a convenient point, it doesn't have to be this minute, we would like to take an [364] afternoon break.

MR. ISAACSON: I will wrap this up.

Q And when your company charged less than $3.35 you don't recall being punished for that?

A Punishment, no, but we did encounter a lot of difficulties because the export price has to be exported according to the $3.35 price; otherwise, we will not be able to get the export permit.

Q So what you would do to deal with those difficulties is you would give rebates or refunds to customers to bring the price below $3.35; isn't that right?

A It did happen, but not often.

Q When it happened you would charge -- you would create a document saying the customer was being charged $3.00 or 35 cents or above and you would rebate or refund some of that money, correct?

A It did happen like that.

***

[367]Q If I can ask you to turn -- I haven't done this for you very often -- to the next tab Exhibit 143. This is going back to August 2005. Is this a monthly report with your attached e-mail monthly report for August 2005 that you delivered on September 4, 2005 by e-mail?

A I did write that.

MR. ISAACSON: I move to admit Exhibit 133.

THE COURT: It is received.

(Exhibit 133 so marked)

Q Again, in the second bullet on item number one discussing price, did you report the export price difference of normal Vitamin C accumulated in previous months by AMC, namely, the real export price lower than the price limit set of by Customs office of U.S. dollars $3.35 per kilogram, little A?

A Little A, okay.

Q Export price difference normal Vitamin C accumulated in previous months by AMC, namely, the real export price lower than the price limits set by Customs Office of U.S. dollars 3.35?

A What is your question?

Q You were recording that prices were being charged below the export price of $3.35, correct?

A Yes, that is what is stated here some of these sales to AMC was below the customs limit price of 3.35 and that [368]deferential has reached $53,000 U.S. dollars.

Q Thank you.

***

[369]MR. MASON: Well --

THE COURT: What it says in the Chinese?

MR. MASON: I don't read Chinese so --

THE COURT: It is not Chinese, it is English.

MR. MASON: It says what it says here, Your Honor.

THE COURT: It says U.S. dollar 53,000.

All right. Go ahead.

MR. ISAACSON: We agree it says here what it says.

Q Exhibit 144. I am sorry. Yes, 144.

Now, this is a memo from a meeting November 16, 2005.

It says here: It was attended for your company by Mr. Qiang. You can tell me if I'm wrong, I don't believe you prepared this memo but did you receive a copy of it?

A I think I must have gotten it.

MR. ISAACSON: I move to admit Exhibit 144.

THE COURT: That is admitted over objection.

(Exhibit 144, so marked)

Q All right. In item two there's some references to some statements by Mr. Qiao. Do you see where it is reported that he said: I heard that someone offered a price below U.S. $3, U.S. $2.90 delivery to the buyer's side?

THE INTERPRETER: U.S. dollars, what?

MR. ISAACSON: Two dollars.

A That is what is written in the document.

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EXCERPT OF THE DIRECT EXAMINATION OF HUANG PINQI OF HEBEI WELCOME PHARMACEUTICAL CO., LTD. AND NORTH CHINA PHARMACEUTICAL GROUP CORP., FEBRUARY 28, 2013

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[414](The following took place in open court).

BY MR. MASON:

Q Sir, do you recall being asked about a memorandum that you wrote in August 2002 where you made reference in the memorandum to the fact that there had been some contacts from sales department of the various Vitamin C manufacturers on the topic of exchanging information, discuss possible raising of prices?

A Yes, that happened yesterday. That did happen.

Q And isn't it a fact, sir, that you were not -- let me ask a preliminary question. These were internal memos that you gave to your boss or people within your own company?

A You are talking about the records?

Q Yes.

A That is for internal consumption.

Q You will not state in a memo necessarily that the Chamber told us to have these communications, you would just say the fact that you had them; isn't that correct?

A In most memos people just express the plain points, the expressions.

Q Right, but you didn't tell them that the Chamber had told me to have these conversations because you didn't think it was necessary to say that?

A It was not mentioned in the memos.

Q But the reason it was not mentioned, I take it, was [415] because you didn't think it was necessary to mention?

A That's for internal usage. Besides the people I was reporting to -- my colleagues and my superiors, they have understanding of the circumstances.

Q Okay. The circumstances being that this conduct was -- excuse me -- the circumstances being that the Chamber told the companies to engage in such information on price discussions?

A They all know.

Q Now, sir, you were asked some questions by counsel about quotas?

A It was mentioned.

Q And quotas refers to how much product a Vitamin C manufacturer can sell for export?

A Yeah, quota, that means export quota. They have two meanings. One concerns the control of the quantity. In other words, there's a quota figure for the total export quantity for China, and therefore, each manufacturer, how much of a percentage of their quota -- how much of their quota is -- how do you say -- assigned to the -- each manufacturers. There's certain percentage for each manufacturer.

Q And in fact, the Chamber of Commerce assigns the quotas to the manufacturers?

MR. ISAACSON: Objection.

THE COURT: I'm sorry. What is the objection?

MR. ISAACSON: Time period.

[416]MR. MASON: That is for redirect.

THE COURT: I agree. Overruled.

A I haven't finished what I was saying about the two meanings. The second thing was regarding pricing, especially towards the request for minimum export price. I think the meanings for quota refers to those main issues.

Q Okay. Let me ask you, Mr. Wang, with regard to the amount -- the quantum of quota, with regard to the amount of quota each of the Vitamin C companies in China had, those amounts were told to the companies by the Chamber of Commerce; isn't that correct?

A Each manufacturer could participate in a discussion. They could present their viewpoints and their requests but the final decision was up to the Chamber.

Q And so it was the Chamber that determined at the end of the day the quota for each of the companies, right?

A The final decision and approval was by them.

Q So although there could be a discussion about the amount of the quotas, and oftentimes there was a discussion about the amount of the quotas?

A There would be one of the main subjects of the agenda.

Q Was it was the Chamber who at the end decided what the quotas would be?

A The convening of the meeting, and the final decision of the meeting was by the Chamber.

[417]Q And in fact, isn't it true, sir, that sometimes the Chamber might take away a quota from a company if they -- if the Chamber determined that the company had done something wrong, if the Vitamin C manufacturer had not followed a particular instruction?

A Yes, they did have authority to do that.

Q And the companies knew that if they didn't follow the instructions of the Chamber the Chamber had the power to restrict or limit quotas?

A The Chamber did have that authority.

Q And the Vitamin C manufacturers were well aware that the Chamber had the authority to penalize the Vitamin C manufactures if the Chamber decided they were going to do that?

MR. ISAACSON: Objection; foundation.

THE COURT: Sustained.

MR. MASON: I am not understanding the objection, Your Honor. Limit.

THE COURT: Let's go to the side bar.

MR. MASON: Well, I don't want to mean to prolong it. I will do it again. I just want to know --

THE COURT: Let's go to the side bar.

[418](The following took place at side-bar).

MR. MASON: I am sorry, Judge.

THE COURT: There are two problems with the question. Number one, you are asking for broad conclusions about what the Ministry might do and you have not shown that he knows what the Ministry might do. The second objection to the last question in particular was that you said and here's what to be called a manufacturer and you have not show if he knows what the other manufacturers --

MR. MASON: Thank you.

(End of side-bar)

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[555]EXAMINATION CONTINUES

BY MR. ISAACSON:

Q All right. If I can -- we can put on the screen and there is a reference to a price in the third -- actually, in the third paragraph, sir. If you can look at that? At the bottom there is a reference to 2.80 to 2.90 US dollars.

It says, even though the chamber has adopted --

A I see it.

Q All right. It says: Even though the chamber has adopted the measure of preverification signature and stamp to limit the price, each company is still selling actively at $2.80 and $2.90 US dollars.

Do you see that?

The first paragraph refers to providing quotes for 3.35 or above.

Do you see that?

A I see them.

Q All right. Does that assist your memory, that the companies were able to sell vitamin C for less than the verification and chop price of 3.35?

A Now I recall that during that period of time, because the high and lows of the pricing, such situations did occur.

Q Let me show you some of your contracts. I will approach you with 426 A, which is a stack of contracts. I am not going to ask you to look at all of them.

[556]These are vitamin C contracts of Hebei Welcome.

MR. ISAACSON: I move to admit Exhibit 426 A.

MR. MASON: One second, Your Honor.

(Pause.)

MR. MASON: Your Honor, this is a whole stack. May we approach?

THE COURT: You have seen the stack, have you not?

MR. MASON: We have seen it before.

THE COURT: But you want to approach?

MR. MASON: Yes.

THE COURT: Let's approach.

[557] (Side bar.)

MR. MASON: Your Honor, these are, as you can see, a whole bunch of documents. Some of these are outside the relevant period. A lot of them contain arbitration --

THE COURT: They are post the class period?

MR. MASON: Yes.

A lot of them contain arbitration -- I don't know what he is going to do with them. I don't know what -- I don't know what the relevancy of this is. Is he going to go through every one of these documents?

THE COURT: He says no, thank God.

What are you going to use them for?

MR. ISAACSON: I am going to point out several -- they are all contracts with prices less than 3.35. I am going to show him several of them quickly. I will proceed with the line of questioning I am on.

THE COURT: Okay. What's wrong with what?

MR. MASON: Nothing.

THE COURT: Okay.

[558](In open court.)

MR. ISAACSON: I move to admit 426.

MR. MASON: Well --

THE COURT: You just said it's okay.

MR. MASON: To question him. Not to -- he said he was going to -- could I say --

THE COURT: The documents are admitted.

(Marked.)

Let's continue.

If you have an objection to a particular use of them, you will let me know.

EXAMINATION CONTINUES

BY MR. ISAACSON:

Q So the first contract, I just want to show you some things. I realize there is a lot of English here so I can't ask you about everything.

The first contract, and hopefully the translator can help you, there is a column for unit price. You can see, it's a unit price for $2.95.

A I see it.

Q Right.

Just for your information, this is a shipment to New York and there is a reference Welcome's New York warehouse.

Do you know what Welcome's New York warehouse was?

[559]A I do not know.

Q All right. Sir, I am just going to point out some prices to you so you can see contracts that were below $3.35.

So if you turn to the next page, do you see that the price is $3.10 per kilogram?

A I see it.

Q All right. Next two pages are kind of hard to read so if we go to the page 4761 at the bottom. This is a shipment to Los Angeles.

Do you see the price there is $2.75.

A I see it.

Q On the next page, this is another New York shipment to Welcome's New York warehouse, $2.95.

A I see it.

Q Sir, we have put together this package of contracts with prices less than $3.35.

How did you get a chop on these contracts?

A I don't know how --

MR. CRITCHLOW: Objection. Objection.

THE COURT: Sorry? Is there an objection?

MR. CRITCHLOW: Yes.

A That was handled by the sales manager.

THE COURT: What's the objection?

Withdrawn?

MR. CRITCHLOW: I'm sorry?

[560]THE COURT: Is it withdrawn or do you need to be

heard?

MR. CRITCHLOW: May I approach?

THE COURT: Sure.

MR. CRITCHLOW: My objection quite simply is, I asked how did you get a chop. There is no testimony there was a chop.

THE COURT: I think that's the point of his question. There is nothing wrong with the question. You may have cross-examination. You can say, do you see a chop on this contract. That would be fine.

There is nothing wrong with the question.

It is overruled.

MR. CRITCHLOW: Thank you, Your Honor.

[561](In open court)

EXAMINATION CONTINUES

BY MR. ISAACSON:

Q How did you get a chop that would permit you to make these shipments of vitamin C to the United States, sir?

A That was not a matter handled by the board chairman. It was handled by the sales manager.

Q So you don't actually know whether you obtained chop approvals for your shipments to the United States?

A I only know that at the time the market competition was very fierce. The price was very low. I know that there was a lot of inventory in the warehouse of the company.

Q If your company wanted to show that it had chop approvals for the shipments to the United States, it could show those to us, right?

A I don't know. As the chairman, they are not going to report to me on a daily basis about that.

MR. ISAACSON: I don't have any further questions.

THE COURT: All right. Cross-examination.

MR. PRESCOTT: Thank you.

[562]CROSS-EXAMINATION

BY MR. PRESCOTT:

Q Mr. Huang, you will be happy to hear that I have only two questions.

During the years 2001 to 2006, approximately what proportion of Hebei Welcome's production was for export sales?

A For what I remember in our enterprise, we rely mainly on exports. From what I recall, each year our export quantity will reach between 70 to 80 percent.

Q Between 70 to 80 percent of your output was for the export markets, sir?

A Exports.

Q And that's your exports of vitamin C from China, correct?

THE INTERPRETER: Say again.

Q That is referring to your exports of vitamin C from China, correct?

A Correct. It is for the VC item.

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EXCERPTS OF THE DIRECT EXAMINATION OF ZHENYING FENG OF WEISHENG PHARMACEUTICAL CO. LTD., FEBRUARY 28 AND MARCH 4, 2013

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[609]The chamber, the chamber of commerce of medicine and health products. Now, as I understand it, you're not sure whether the chamber is registered in China as a nongovernmental organization?

A Right. I know that the chamber was an organization within the Ministry of Commerce.

MR. ISAACSON: Move to strike, foundation.

THE COURT: I don't know about foundation. Nonresponsive, I sustain that.

[610]Q My question is: You are not sure whether the chamber is registered in China as a nongovernmental organization; is that right?

A I don't know exactly how they registered themselves, but I just know the upline organization was Ministry of Commerce.

MR. ISAACSON: Okay. Move to strike the latter portion of the answer after "but I just know."

THE COURT: Well, that, I'm not so sure. I'll overrule that.

Q You are not sure whether you have ever heard that the chamber is a nongovernmental organization; right?

A We always consider it as a government organization.

Q You're not sure if you've ever heard that the chamber was registered as a nongovernmental organization in China; correct?

A Right. Because the leaders of the chamber were all designated by Ministry of Commerce.

MR. ISAACSON: Move to strike as nonresponsive.

THE COURT: Granted.

Sir, you need to answer just his question.

Q Have you ever heard -- you're not sure whether you've ever heard that the chamber was registered as a nongovernmental organization in China; correct?

A Right.

Q Now, when you were general manager of Weisheng in 2001, [611]do you remember there was a price war for Vitamin C going on?

A You have a time period?

Q 2001, continuing to almost the end of the year.

A Yes.

Q And if I can ask you to look at Exhibit 21. Exhibit 21, this is a report that you wrote in June 4, 2002 or thereabouts, with a 2001 work summary and 2002 work plans; is that right?

A I did not write this.

Q Okay. I've misunderstood.

MR. ISAACSON: I move to admit it.

MR. MASON: No objection.

THE COURT: It's admitted.

(So marked.)

Q If you put up the first page, it lists you as a sponsor. Tell me what that means.

A What does it mean in Chinese? That is like a proposal that was reported to Weisheng board by Weisheng Pharmaceutical.

Q Why is your name on the document?

A Because as the general manager, I reported to the board.

Q So, you provided this report to the board?

A Correct. But it was written by the secretary.

Q But you were responsible for presenting it to the board?

A Yes.

[612]Q And the first sentence of the report was that "In 2001, the Vitamin C market saw brutally sharp competition, slacked performance, and a sustained price decline"? That was the first sentence; right?

A Yes.

Q The price decline of Vitamin C was a great concern to Weisheng in 2001; right?

A Yes.

Q There was brutally sharp competition going on in 2001? There was brutally sharp competition going on in 2001; right?

A Yes.

[613]BY MR. ISAACSON:

Q And during that period, there was, the Chamber existed?

A It existed.

Q Yes. The Ministry of Commerce existed?

A I don't not recall at that time whether it was MOFCOM or MOFTEC.

Q Whatever its name, you had a Ministry of Commerce in 2001, is that right?

A It may have been called MOFTEC at that time.

Q The vitamin C committee existed during this 2001 price war, right?

A Yes.

Q New, if I can ask you to look at Exhibit 134, this was previously admitted and this is a document with two annexes. The first annex on the page are minutes of meetings. Please look at the meetings of meeting that begin on November 16, 2001. Annex one, Minutes of Meeting.

Do you see that? See the minutes?

(Exhibit published.)

A I see.

Q All right. And it says there was a meeting on November 16, 2001 that the Chamber held in Beijing with the heads of vitamin C manufacturers. Do you see that?

And do you see you're listed as attending the meeting?

[614]A Yes.

Q Do you recall the meeting, sir?

A I do.

Q And in the minutes, in the second paragraph, do you see where it says, after a couple of sentences: Therefore, the participants of the meeting, and it references their discussions, that they have reached an agreement aimed at enhancing the self-discipline of the industry. They have concluded that Chinese vitamin C manufacturers are absolutely capable of realizing the self-discipline of the industry.

Those are true statements, aren't they, sir?

That's what happened at the meeting?

A They, they mentioned that industry self-discipline under the instructions from the Chamber.

Q Well, we'll have to look for the instructions of the Chamber, but just to be clear, these minutes as you'll see on page one were distributed by the Chamber, weren't they, at page one of the document?

And you talk about instructions, sir, but after it talks about how the manufacturers are absolutely capable of realizing the self-discipline of the industry, it also goes on to say that after, it is relatively easy to reach unison within the industry, under the item, Secondly. Do you see that?

That was a true statement by the Chamber, wasn't it?

[615]A That was what was said by the Chamber under Mr. Qiao's instructions, that it is easily reached.

Q All right. The document is truthful when it says it was relatively easy to reach unison within the industry, right?

A That's what Mister -- that's what Mr. Qiao stressed, that a unison must be reached, so he thought that it would be relatively easy.

Q And it turned out to be relatively easy, didn't it?

A Yes.

Q In fact, as it says in the next paragraph, the minutes reflect that by way of hand voting, the resolution to restrict export volume and protecting price was passed unanimously?

Those minutes were correct, right, sir?

A In every meeting, each person expressed his views and then a decision would be made by Mr. Qiao from the Chamber.

MR. ISAACSON: Move to strike as nonresponsive.

THE COURT: Granted.

Q Sir. My question was the minutes are correct that the resolution was passed unanimously, correct?

A Under the instructions of Mr. Qiao, unanimously passed, correct.

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[640]Q Let's see if this helps you. Turn to Exhibit 50 in your binder. Exhibit 50 are minutes by Wang Qi of JJCP of a meeting on November 3rd, 2002, in Beijing the record that you attended.

A Yes.

Q And item 2, you will see that there is discussion of quantity issues. Do you see that?

A I see.

Q In the middle of that, there is a paragraph discussing the adjustments decline. Do you see that? Yes, we can put it on the screen. It was previously admitted. So go to the next page, the paragraph in the middle about adjustment. Do you see the discussion of adjustment?

A I see it.

Q All right. And there is a discussion of an extra quota for the year and Wang Qi records, "We are asked to tell outsiders that the total production in 2002 is no more than 40,000 tons. But the total production is actually going to be 43,000 tons." You recall this discussion taking place at [641]this meeting, don't you, sir?

A The final figure of 40,000 tons was decided by Qiao, Mr. Qiao, Q-I-A-O.

MR. ISAACSON: Objection; move to strike.

THE COURT: I'm going to grant the motion. I'm going to ask the witness again, please answer the question that's been asked.

BY MR. ISAACSON:

Q All right. My question, sir, you recall this discussion at the meeting, don't you?

A I do.

Q If I can ask you to look to turn to tab 51, the next tab, Exhibit 51 previously admitted. This is another meeting

minutes drafted by Wang Qi. It's for a meeting dated February 24, 2003, and it records that you attended.

Do you see that, sir?

A Correct.

Q And this meeting was at the Rainbow Hotel in Shanghai.

Do you recall going to meetings at the Rainbow Hotel in Shanghai?

A I did participate in the meeting, I just don't recall where.

Q You don't remember the Rainbow Hotel in Shanghai?

A There are many venues for meetings, so exactly where it was, I don't have a recollection.

[642]Q Do you see at the top, it talks about the basic key points of the meeting?

A I see it.

Q Item 1A, "Keep the verification a shop requirement, but oppose no volume limit." Do you see that?

A I see.

Q It was decided at that meeting the verification and chop would continue, but there would be no limits on volume of vitamin C, right?

A Yes.

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[652]MR. ISAACSON: I move to admit Exhibit 66.

THE COURT: That's received.

(Plaintiff Exhibit 66 was admitted into evidence.)

BY MR. ISAACSON:

Q If I can ask you to turn to, in the Chinese, the -- there is a section at the bottom of page 2 that begins, "Paid attention to market status analysis and improved coordination in the industry." That's on top of page 3 in the English. Do you see that title?

A I see it.

Q And there are 3 paragraphs, numbered paragraphs under that. I want to ask you to look at number 3. All right. And that paragraph reports, "Fully exerted our company's function as the Rotating Chairman of the VC chapter of the Chamber of Commerce of medical health products proactively organized and participated in the coordinating meetings of the CV chapter of the Chamber of Commerce and medical health products. It says, "We organized a large producers to coordinate and adjust industry strategies, enhance our work in regards to the strengthening of the health regulation in the industry and stabilization of the market price and the guiding the market to develop in a normal way." Those were [653]true statements, weren't they sir?

A Not totally accurate because the person who wrote this document was not totally familiar with the situations.

Q Well, your assistant also attended vitamin C subcommittee meetings, Mr. Wong, right?

A Yes.

Q He attended many of the meetings with you, right?

A Yes.

Q And in his report or in the report of his department, he says that we, that is Weisheng, organized the large producers to coordinate and adjust industry strategies; is that right?

A I didn't. He didn't have the capabilities. I think he was exaggerating his capacities.

Q This was another false report by your company; is that right, sir?

A He exaggerated the function of his department.

Q You say he exaggerated. Was this a false report by your company by the International Business Department?

A Correct. If you say it like that, it is incorrect.

Q What about the very last sentence of that report, "Nevertheless, we need to find out the shortcomings we had and correct them to prepare us to fight the upcoming competition in the international market." Do you see the very last sentence?

[654]A I don't think that has any problem.

Q Sir, even though you're telling us that the Chamber was telling you what to do, you were preparing for competition with the other companies, weren't you?

A Yes, it's the competition within the industry.

Q Sir, can I ask you to look at Exhibit 141. We just finished looking at a document from October of 2004. Now we're looking at one from January of 2005. Do you have 141 in front of you?

A 141, yes.

Q Now this is reflected as a speech by Mr. Kong Tai in January of 2005. He's from JJPC. You know him, right?

A I do.

Q I move to admit Exhibit 141?

MR. MASON: Objection.

THE COURT: Yeah, that's received over objection.

(Plaintiff Exhibit 141 was admitted into evidence.)

BY MR. ISAACSON:

Q I want to ask you about a statement in the speech. That statement is on page 9 of the Chinese and of the English. Mr. Kong Tai was the president of JJPC right?

A Yes.

Q You knew him as the top official of JJPC at your meetings?

[655]A I knew him as the general manager, the rest of his organization, I'm not sure.

Q You knew he -- in terms of who you saw at meetings, he was the highest official at JJPC that you met, right?

A Yes, I think he was. He was.

Q And he attended Summit meetings?

A Correct.

Q Now, on page 9, do you see how he discusses that there has been expansion by the vitamin C manufacturers, page 9 at the very top?

A Yeah.

Q All right. And then after the discussion of expansion and the next, I think it's the third sentence, "These VC enterprises mediated by the Chamber of Commerce," do you see that? "Took measures last year to limit production to protect price. And to ensure a soft landing of the price plunge. But in the long run, special allegiance is vulnerable and will easily succumb to the temptation of profit and before the test of time."

A Yes.

Q Did you agree with Mr. Kong in July of 2005, that the allegiance to the companies to their agreements were vulnerable and there was concern that they would succumb to the temptation of profit?

A This is a speech expressed by Kong Tai. I had no [656]communication with respect to what he said. I don't know what he meant by that.

Q Do you agree with what he said there?

A I cannot really consider that issue right now.

Q All right. Let me ask you about the statement by another company. Exhibit 42, sir, please. Exhibit 42 is a report -- 42. Do you have Exhibit 42? This is a report provided to us by Northeast Pharmaceutical Group, sir, NEPG. I move to admit Exhibit 42.

MR. MASON: Objection, your Honor.

THE COURT: All right. Received over objection.

(Plaintiff Exhibit 42 was admitted into evidence.)

BY MR. ISAACSON:

Q And I want to ask you about a statement there? If you turn to page 8 on the Chinese, which is also on page 8 of the English. There is an item 6. "Strengthen self-regulation in the VC industry, but don't rely completely on the gentleman's agreements of the Chamber of Commerce." That's a term that you're familiar with, isn't it, sir, that your agreements with other companies were gentleman's agreements that sometimes you honored and sometimes you didn't?

A I'm not certain about what NEPG meant by that phrase, but as to industry self-discipline, we must abide by that.

Q All right. You heard of your self-discipline [657]agreements referred to as gentleman's agreements before, haven't you?

A I have not heard -- what they meant by gentleman's agreements in China, it just means an agreement and whatever as to the industry self-discipline, that was what was said by the Chamber.

Q You were familiar with concerns at your company and expressed by other companies that the agreements would not be honored, right?

A The gentleman's agreements meant if the Chamber said that, you must abide, that you must abide. If they meant that you don't need to abide by it, then we didn't need to abide by it.

Q Are you saying the Chamber sometimes told you there were agreements that you didn't have to abide by?

A Correct. Sometimes the Chamber did not require to reach an agreement.

Q And do you -- are you aware of any written records at your company that explain when the Chamber required you to enter an agreement as opposed to not requiring you to enter an agreement?

A There's no such record, but within the Chamber they must have. And once the agreement is reached, they said you must abide by it and if there was no such agreement reached by the Chamber, then we don't have to abide.

[658]Q So there were situations where there were agreements that you did not have to abide by?

A Correct.

Q And you have no written record of what agreements you were supposed to abide by?

A No it's only in according to the contents of the meeting. If they -- they wanted to fix it, then they fix it. If they didn't need to fix it, they didn't.

Q All right. Well, we asked you to look at -- no, I'm sorry. Have you seen a single document of your company that says there was an agreement on price or volume that you were required to abide by?

A That I don't remember clearly.

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Q Exhibit 59. This is a document -- minutes of a general -- of a meeting of the general manager's office, right?

A Yes.

[659]MR. ISAACSON: I move to admit Exhibit 59.

MR. MASON: No objection.

THE COURT: All right that's received.

(Plaintiff Exhibit 59 was admitted into evidence.)

BY MR. ISAACSON:

Q This is a meeting you hosted in November of 2005?

A Correct.

Q All right. And at page 3, it records that you provided a briefing about a Chamber meeting. And in item 2, what you reported was the major Chinese vitamin C manufacturers are all planning to organize production suspension around March of 2006, to curb production output. That was the report that you made, right, sir?

A I think the Chamber did decide to organize a stoppage of production in March.

Q But all that's recorded that you reported were the plans of the manufacturers, right?

A Correct.

Q Is this another false document, sir?

A It's not that it's -- it's not that it was false, but we cannot possibly put down that it was decided by the Chamber on every occasion. But the fact is that was – the stoppage of production was designated by the Chamber.

Q In fact, you didn't put down on any occasion that it was decided by the Chamber, right?

[660]A Didn't I say earlier. In the earlier sentence I read about a CCMHPI coordination meeting?

Q Right. All you did was mention there was a Chamber meeting, right?

A And the contents of the meeting was to instruct the manufacturers to stop production in March.

Q That's not what the document says sir. Was the document false?

MR. MASON: Your Honor.

THE COURT: No, overruled. Overruled.

THE WITNESS: It's correct because it's under what was briefed about the Chamber number one concerns the sales, number two concerns the limitations of production.

Q So the document was correct. Thank you, sir.

A Correct.

Q Thank --

A Because I breathed and conveyed what was said at the Chambers Coordination Meeting.

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[661]BY MR. ISAACSON:

Q Exhibit 260 is a report provided to us by Weisheng. Counsel, I have English 260 and Chinese in 259.

MR. MASON: Try looking at the back of the English of 260. I want English. Oh, okay. Okay.

MR. ISAACSON: There you will see Chinese. I move to admit Exhibit 260.

MR. MASON: I know I have an objection to it.

MR. ISAACSON: It's a Weisheng report.

THE COURT: What was the objection?

MR. MASON: Well, it can go in, your Honor.

THE COURT: All right. Received.

(Plaintiff Exhibit 260 was admitted into evidence.)

BY MR. ISAACSON:

Q All right. In the first paragraph, do you see in the middle there is a reference to how the price for vitamin C had stabilized at around $3 -- actually the price of $3 per kilogram.

A Yeah, I see it.

Q All right. You are aware that there were times when Weisheng was selling vitamin C in the United States for less than the minimum price of $3.35, right, sir?

A I do.

[662] Q And you were doing that -- when you sold vitamin C into the United States for less than $3.35, were you doing that after getting your contracts chopped?

A Because by that time $3.35 was not the market price already. And the enterprise was facing difficulties. We would not be able to export in accordance with that price. But if we do not go with that price, the Chamber will not give us the chop. The enterprises were in a hot place.

Q Sir, my question was: When you sold vitamin C into the United States below the minimum price of $3.35, did you get your contracts chopped or approved by the Chamber?

A It happened very rarely with Weisheng, but it did happen. It was signed another contract which is lower than 3.35.

Q So did you sell into the United States with contracts that were not chopped?

A When they exported in customs, is all chopped as 3.35. But the contract implemented with the customer was lower than 3.35.

Q Are you --

A But what was written with the customs was always 3.35.

Q Are you saying that when you wanted to sell below 3.35, you could submit false documents to the Chamber and to customs.

A Yeah, I gave them the 3.35 document. He would not [663]lower than that, they would not have given us the chop.

Q My question, sir, is were you able to give customs and the Chamber false documents in order to sell vitamin C at prices below $3.35?

A Yes.

Q All right. Your company is still selling to customers in the United States, vitamin C, correct?

A We were still selling VC to the United States.

MR. ISAACSON: I have no further questions.

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EXCERPTS OF THE CROSS EXAMINATION OF ZHENYING FENG OF WEISHENG PHARMACEUTICAL CO. LTD., MARCH 4, 2013

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[680]Q Sir, you were asked many questions by counsel for plaintiffs about meetings with vitamin C subcommittees. Do you recall those questions?

A Some I do. Some I don't.

Q Okay. Fair enough. And do you recall you were asked questions about authority of vitamin C subcommittee with regard to members of the vitamin C subcommittee. Do you [681]recall that topic?

A Authorities of the subcommittee there. I do.

Q Okay. At the meetings that you attended for the vitamin C subcommittee, was Mr. Qiao Haili, the representative of the Chamber and the subcommittee, at the meetings on behalf of the Chamber and the subcommittee. Let me rephrase it. Is it not the case that Mr. Qiao Haili was a representative the Chamber and the vitamin C subcommittees at the vitamin C subcommittees that you attended?

MR. ISAACSON: Objection; compound.

THE COURT: Yeah. Rephrase the question, please.

BY MR. MASON:

Q Was Mr. Qiao Haili, the representative of the vitamin C subcommittee, at the meetings that you attended of the vitamin C subcommittee?

A He was the head of the western medicine department for the Chamber, but also a the -- he was -- he was like secretary and director of the VC subcommittee.

Q When you attend the VC subcommittee meetings, Mr. Qiao was at the meetings?

A Yes, he was present every time.

Q Do you recall receiving instructions from Mr. Qiao on behalf of the Chamber about the concept of industry coordination?

A He did.

[682]Q And what instructions did Mr. Qiao Haili give you with respect to industry coordination involving vitamin C?

A Yes.

Q Yes? What instructions did he give you?

A Regarding VC, coordination the instruction he gave us were to allocate quantity to determine the minimum price stoppage of production or reduce production and puts inventory in the Shanghai warehouse.

Q Were all these matters directives that you received from Mr. Qiao?

MR. ISAACSON: Objection; leading.

THE COURT: No. I'm going to let him lead.

THE WITNESS: Yes.

MR. MASON:

Q In fact the process that was involved at the vitamin C subcommittee was in your view a mandatory process that the vitamin C companies were required to engage in?

A Right. For meetings, Mr. Qiao notified us for a to convene a meeting. He designated the gender and the content of the meetings. He directed the VC enterprises for discussions and he would make -- eventually he would make the decisions for the meetings.

Q Okay. So he made decisions with regard to minimum price that vitamin C subcommittee members could charge?

A Yes.

[683]Q And Mr. Qiao gave directions as to the quotas or the allocation of products that the vitamin C subcommittee members could have?

A Yes.

Q And he gave you instructions with regard on occasion to being directed to stop production of vitamin C?

A Yes.

Q And on occasion he gave you directions with regard to having to put certain vitamin C inventory in a warehouse?

A Yes.

Q And he told you that if his directions were not followed, then the government would impose penalties on the companies who did not follow his direction?

A Yes.

Q And those penalties included a refusal to allow the vitamin C subcommittees to export product?

A Yes.

Q And these policies were in effect, as far as you know, at least from 2001 when you first attended a vitamin C subcommittee?

A Yes.

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[688]Q Are you familiar with the term self-discipline, sir?

A Yes.

Q And what is self-discipline as applied to the vitamin C industry in China?

A Self-discipline within the industry in China means that [689]these VC manufacturers must follow the instructions from the Chamber regarding VC importation for the sake of the entire health of the entire VC industry.

Q And in connection with self-discipline, did you receive instructions from Mr. Qiao that you needed to have minimum export prices?

A I did.

Q And did you receive instructions from Mr. Qiao that Weisheng would be limited as to how much vitamin C could be export by Weisheng?

A Yes, both the export quantity and the export pricing.

Q And you were present at meetings, were you not, sir, where Mr. Qiao gave these instructions not only to Weisheng, but to all the vitamin C manufacturers?

A Correct.

Q Did Weisheng and the other vitamin C manufacturers have the ability to ignore the requirements of self-discipline?

A We must abide by it.

THE COURT: Mr. Mason, about how much more do you have?

MR. MASON: Sometime, your Honor, so.

THE COURT: All right. Let's take a break for lunch, ladies and gentlemen. We'll come back here at 2:10. Please don't talk about the case amongst yourselves or anyone else. Have a nice lunch.

[690](Jury is out of the courtroom at 1:04 p.m.)

THE COURT: All right. 2:10, see you then.

(Recessed and recalled.)

[691]THE COURT: Have a seat for just a minute before we bring in the jury.

Mr. Mason, I wanted to give you notice that I'm going to apply some restrictions to your continuing use of leading questions. When I look back over the testimony, you were really testifying. The witness was just saying shih dr, which means yes. And, you know, the Rule 611 and the advisory comments suggest that I need not allow full leading questions or unbridled leading questions when you're cross-examining your own witness.

I'm going to allow you some leeway both because we've done it so far and because we have the same translation difficulties that we have throughout the case. But I wanted you to be on notice that if it continues to be this lawyer makes a statement and the witness says yes, then I'm probably going to cut it off at some point.

MR. MASON: Thank you, sir. So I can do a little of it but not too much?

THE COURT: Yes. And we'll find out. No doubt Mr. Isaacson will object when he thinks it's gone too far, and I'll decide.

(The jury entered at 2:14 p.m.)

THE COURT: Be seated, please.

Mr. Mason, you may continue.

MR. MASON: Thank you, Your Honor.

[692]CROSS-EXAMINATION

BY MR. MASON:

Q Mr. Feng, when Mr. Qiao spoke at Vitamin C subcommittee meetings, did he speak with the authority -- I'll start again.

Mr. Feng, when Mr. Qiao spoke at Vitamin C subcommittee meetings, did he speak with the authority of the Chinese government?

MR. ISAACSON: Objection.

THE COURT: Sustained. And for the reason we just discussed.

BY MR. MASON:

Q When Mr. Qiao spoke at Vitamin C subcommittee meetings, based upon the years that you attended Vitamin C subcommittee meetings and your familiarity with the procedures at the Vitamin C subcommittee meetings, did you understand that Mr. Qiao spoke with the authority of the government?

MR. ISAACSON: Same objection.

THE COURT: Sustained.

BY MR. MASON:

Q Whose authority did Mr. Qiao speak on behalf of at Vitamin C subcommittee meetings?

MR. ISAACSON: Objection.

THE COURT: Sustained.

[693]Do you need a side bar?

MR. MASON: Yes, sir.

(Sidebar begins.)

[694]THE COURT: I might or might not have sustained the first two as leading, but the reason I sustained the objection to all three of the questions is because they call for a conclusion.

MR. MASON: So can I ask them did Mr. Qiao tell you who he was speaking on behalf of?

THE COURT: You can ask him what -- well, I don't want to give you legal advice, but you can eliminate both the conclusion and the leading question nature if you say to him what did Mr. Qiao tell you, if anything, about his authority.

(Sidebar ends.)

[695]BY MR. MASON:

Q Sir, what did Mr. Qiao tell you, if anything, about his authority?

A In the name -- he told me that he was speaking on behalf of the government.

MR. ISAACSON: Your Honor, request the instruction that you gave earlier.

THE COURT: The same limiting instruction, ladies and gentlemen. That doesn't mean that you should take it as true that Mr. Qiao was speaking for the government. The evidence is offered for you only so that you understand that this witness alleges that he heard Mr. Qiao making that statement.

BY MR. MASON:

Q Sir, I'd like to direct your attention to Exhibit 50, which counsel asked you about this morning.

Do you have that in front of you, sir?

A I see it.

Q If you look at the second page, there's that reference to, and I'm paraphrasing, being asked to tell outsiders about total production being no more than 40,000 pounds in 2002.

A Yeah.

Q Do you see that, sir?

[696]A Yes.

Q Who was the person who asked companies to tell outsiders that statement?

A Was Qiao Haili, Q-i-a-o H-a-i-l-i, who announced to the outsiders.

Q Who what?

A Who announced to the outside world.

Q Thank you.

Sir, do you recall you were shown various documents by counsel this morning and asked whether the documents were false or misleading because to the extent there was reference to an agreement involving Vitamin C companies at the Vitamin C subcommittee meetings, according to counsel, it was misleading because it did not say that the agreement was compelled as a result of what Mr. Qiao might have said?

MR. ISAACSON: Objection.

THE COURT: Sustained.

BY MR. MASON:

Q Do you recall, Mr. Feng, that you were asked about whether the documents that referenced these agreements were false or misleading? Do you recall that testimony?

A Yes.

Q Were you aware that at these meetings, Mr. Qiao had made directions concerning these agreements?

[697]A The views that were expressed by Mr. Qiao?

Q Yes.

A Yes.

Q And did you understand that even though it was not in writing, that Mr. Qiao had made those comments and directions?

A Because every meeting was under his instructions.

Q You were asked some questions, sir, with regard to the rotating chairmanship of the Vitamin C subcommittee. Do you recall those questions?

A I remember.

Q And with respect to the rotating chairmanship and that title, were members of the Vitamin C subcommittee ones who had that title from time to time?

A The rotational chairman is a virtual post --

Q I'm sorry.

A -- and it was taken over by the manufacturers by rotation. Mainly, he was responsible for the expenses of the meeting. And other arrangements did not really have any actual authority.

THE COURT: Did you mean virtual post or ceremonial post?

THE INTERPRETER: He said virtual.

THE COURT: Virtual?

THE INTERPRETER: Yeah.

[698]BY MR. MASON:

Q But did you mean -- I don't know.

THE COURT: It's a translation issue. Go ahead and try to clarify it. I don't know what a virtual post is.

BY MR. MASON

Q Did you mean, Mr. Feng, ceremonial post in describing the duties of the rotating chairman?

A Administrative.

Q Sir, I want to ask you about the verification and chop procedure. Do you recall, sir, that that was instituted by the chamber about 2002?

A Yes.

Q Do you recall how the verification and chop procedure was implemented?

A The chop verification, chop process includes the enterprise contract and application form. We send the form to the chamber. After the chamber put a chop on it, and then the Chinese customs will release the merchandise according to the chop.

Q And what information does the chamber review in deciding whether or not to affix the chop?

MR. ISAACSON: Objection.

THE COURT: Sustained as to form. What does he submit.

BY MR. MASON

[699]Q What information is submitted by the manufacturers to the chamber on the verification of the chop form?

A Quantity, pricing. And then the chamber put the chop on it.

Q What does the chamber have to verify before the chop is placed on the document?

A Whether it complies with the minimum -- complies with the requirement of the quantity as well as the minimum pricing requirement.

Q Is that the requirement imposed by Mr. Qiao?

MR. ISAACSON: Objection, leading.

THE COURT: I'll allow it.

A The instructions of the chamber, yes.

Q Okay.

By the way, with regard to the quantity, were instructions given with respect to the quantity to the companies?

A There's a fixed quantity that is split up into the different companies; and if you exceed that quantity, then he will not get the chop.

Q Who decides what the quantity should be?

A And it was by the chamber, but it was -- it evolved from the ministry of commerce export quota into this verification and chop process.

Q Were the companies allocated certain quotas or [700] quantities?

A Yes.

Q Did the quotas that Weisheng received while you were general manager, did you consider them to be satisfactory?

A Not satisfactory.

Q Why?

A Because whatever quota they assigned to us came to about 50 to 60 percent of our production capabilities.

Q So during the time that you were the general manager of Weisheng, what was the production capability of the Weisheng line?

A The production capacities depended on the periods. Before 2003, it was 15,000 tons. After 2004, it became 30,000 tons.

Q And the quotas that you were given by the chamber, how did they compare with your production capacity?

A It was reduced to about 50 to 60 percent of the capacity.

Q Why didn't Weisheng object to that quota?

A I -- my objection was useless because it was government instructives. Useless.

Q Okay.

MR. ISAACSON: Objection. Move to strike the latter comment.

MR. MASON: No, Your Honor. I asked him why.

[701]THE COURT: The motion is denied.

MR. MASON: Thank you.

BY MR. MASON:

Q Sir, with respect to the price you mentioned, during periods of verification and chop, were there price minimums that were established by the chamber?

A The chamber designated a minimum price.

Q Now, you testified this morning, sir, about -- I think you used the term there were two contracts sometimes. Do you recall that testimony?

A I remember.

Q And could you go over the circumstances that existed with respect to the occasions when Weisheng would have used two contracts?

A It depends on the supply and demand of the market. When there is a big fluctuation, then the pricing designated by the chamber did not comply -- did not -- was not consistent with the market price. Under those circumstances, then that price could not be implemented.

Q Are you familiar with SARS?

A My recollection of SARS was at the end -- between the end of '02 and the beginning of '03. At that time, SARS happened in China. And the public became alarmed. Because VC was able to increase the --

Q Immunity?

[702]A -- immune system, so the Chinese government -- I mean the Chinese people were eager to get them.

Q And did that -- did the SARS event have an impact on price?

A Because of SARS influence, the price of -- the price of VC started to soar highly, speedily actually. But after SARS was over, then the pricing of VC started to slide.

Q And was it about this time when Weisheng used two contracts on occasion?

A Yes, because the pricing was sliding. Then the market price became lower than the price designated by the chamber. Under those circumstances, since the pricing was lower, the situations of the two contracts existed.

Q Did Weisheng tell Mr. Qiao that there were these two contracts?

A No.

Q Why?

A Because had we told him, then he would have deducted our export amount.

Q And are you familiar with the concept of foreign exchange in China?

A Yes.

Q Do you know what a foreign exchange certificate is?

A Yeah. The regulation was that the foreign currency that we receive must be consistent with the amount on the [703] contract. If the foreign currency amount was different from the contract amount, then the exchange could not be implemented into RMB.

Q What impact would that have on Weisheng if the exchange couldn't be implemented?

A Then whatever money was received could not be deposited into Weisheng's account.

Q Did Mr. Qiao have the ability to satisfy the foreign exchange requirements?

A He does not have the authority.

Q Okay.

So what would happen -- did Mr. Qiao ever discover that there were these two contracts on occasion?

A He did not.

Q Okay.

And were efforts made to hide it from Mr. Qiao? Were efforts made to hide this from Mr. Qiao?

A Just did not report to him.

Q You didn't tell Mr. Qiao?

A Right.

Q About how many occasions were there two contracts that Weisheng would have prepared?

A If we're talking about the period of time, the longest period was in '06. Because in '06, the pricing was lower than the designated price.

[704]Q And can you quantify how many times there were two contracts?

A I don't remember clearly.

Q Okay.

Are you familiar with the term or with the epidemic called avian flu, bird flu?

A It was affected by that. At the end of '03 to the beginning of '04, there was avian flu, and people also -- because of the SARS situation, people started to panic about the situation, and then VC price started to rise again.

Q And at some point, did the avian flu epidemic or scare subside?

A Right.

Q And did that affect the price as well?

A Correct.

Q So we're clear, were there two sorts of epidemics, SARS, and then separately there was avian flu?

A Yes.

Q And both had an impact on the price rise?

A It did.

Q In your view, were those impacts significant to the price of Vitamin C?

A Yes.

Q Sir, you mentioned there was, at some point, a production shutdown directed by Mr. Qiao.

[705]A I did.

Q And do you recall the circumstances of the production shutdown as directed by Mr. Qiao?

A There was -- it happened after '03, after SARS, when the pricing of VC started to slide. And so the chamber convened a meeting. At the end of '03, the chamber gave the instructions that basically we need to set up a warehouse in Shanghai, and each company would deposit a certain amount of VC. Another decision was, and it was the middle -- towards the middle of 2004, that there would be a stoppage of production for maintenance.

Q Okay. Mr. Feng, let me direct your attention to the circumstances involving the stop of production first. Do you recall that Mr. Qiao gave instructions to the Vitamin C companies with regard to the stop of production?

A I remember.

Q Can you tell us what Mr. Qiao directed in connection with the stop of production?

A I remember that to be around May, June of 2004, that all the VC producing enterprises should stop production and do maintenance.

Q This is what you were told by Mr. Qiao?

A Yes.

Q And as general manager of Weisheng, were you happy with those instructions?

[706]A At the time, we objected.

Q And what did Mr. Qiao do about your objection?

A And yesterday, I was asked by the other side the same question about Weisheng. Weisheng had a new production line that they were going to test the machinery, but Mr. Qiao Haili requested us to stop everything. We insisted that we should continue with the testing of the new machinery production line.

Q And what did Mr. Qiao say?

A Because we did not did the stoppage, he actually stopped our verification and chop process. Because of his cancellation of the quota, we could not export any more material. So we were obliged to stop production in July.

Q Sir, you also mentioned depositing product, at Mr. Qiao's instruction, in the Shanghai warehouse.

A Yes.

Q Can you describe the circumstances of that?

A Because of the sliding of the market, of the pricing in the market at the time, in order to control the export quantity, Mr. Qiao instructed all the VC manufacturers to put a certain amount of VC into -- into the Shanghai warehouse --

Q And what happened?

A -- because he was afraid that the pricing would [707] continue to tumble. Through this, he was able to control the export amount.

Q Did Weisheng have a choice whether to comply with the instruction to put product in the Shanghai warehouse?

A Weisheng did not have any choice.

Q And what did Weisheng do?

A Eventually Weisheng was obliged to implement.

Q Did Mr. Qiao direct any cross-checking procedures in connection with the inventory that was put in the warehouse?

A One or two persons from each enterprise would be designated to go to the warehouse to do the verification examination, and then whatever results of the examination should be reported directly to Mr. Qiao.

Q And do you know why Mr. Qiao made this direction that there would have to be checking by the manufacturers about each other's inventory drop?

MR. ISAACSON: Objection.

THE COURT: Sustained.

BY MR. MASON:

Q Did Mr. Qiao tell you the purpose of the cross-check?

A Because he wanted to force the implementation of the -- of this -- of the directive. And anybody who refused to implement, that he's going to exercise a penalty, penalties.

Q Sir, do you recall that at some point in 2003, Mr. Qiao imposed a certain export minimum price that was higher than [708]335?

A From what I can recall, I think there was price of like $9.20, U.S. dollars.

Q And, sir, was that during the SARS period?

A After SARS passed, correct.

Q And what happened to the $9.20 price?

A Since the pricing kept on sliding and then the supply and demand of the market changed, the fact -- the truth of the matter is that market price was already below this price.

Q And so what did Mr. Qiao do with regard to the $9.20 price?

A Because nobody was able to export, within a very short period of time, he eliminated that minimum price again.

Q Do you recall about how long the $9.20 price remained in effect?

A About a month.

Q And then was it canceled by the chamber?

A Yes. They canceled the $9.20 price.

Q Did Mr. Qiao give any instructions to the Vitamin C companies about any obligation to discuss pricing of Vitamin C outside the Vitamin C meetings themselves?

A Mr. Qiao required the sales manager of each enterprise to constantly share the information of the market, and whatever they shared must be reported back to him.

[709]Q Okay.

MR. MASON: Could you please put Defendant's Exhibit 21 in front of the witness, please.

BY MR. MASON:

Q Have you seen this before, sir?

A I have seen this.

Q Do you recall when you received it?

A I don't remember having received it.

Q I'm sorry, I thought you said you saw it before.

THE COURT: When did you see it before?

A I don't remember when I saw this document, the time. I know the result of the document.

Q Okay.

MR. MASON: Your Honor, there's no objection to this. May it be received?

THE COURT: No objection, right?

MR. ISAACSON: No objection.

THE COURT: Received.

(Defendant Exhibit 21 was admitted into evidence.)

BY MR. MASON:

Q Sir, is this a document that was prepared, to your knowledge, by the Chamber of Commerce?

A Yes.

Q And it refers -- there's a date on it at the bottom of April 16th, 2001.

[710]Do you see that, sir?

A I see it.

Q Is this about the time you attended your first Vitamin C subcommittee meeting as general manager of Weisheng? Is that correct, sir?

A Yes.

Q Could I direct your attention to the second paragraph, starting with the second line that starts out "the coordinated export price for Vitamin C has been adjusted to more than CIF 3.20 U.S. dollars."

Do you see that, sir?

A I do.

Q And do you see at the last phrase starting "where the above-described exports in violation of the rules as been reported"? The third line from the bottom? Do you see that?

A Yeah, I see it.

Q And it says "where the above exports in violation

of the rules has been reported, once verified through investigations, recommendations shall be made for the Ministry of Foreign Trade and Economic Cooperation to reassign the violating enterprise's quotas to the reporting enterprise."

Do you see that, sir?

A I see.

[711]Q Is the Ministry of Foreign Trade and Economic Cooperation, that's MOFTEC?

A Yes.

Q And then there are copies identified to various agencies. Do you see in the Chinese there's a line that says CC, and it says copies of this to the Ministry of Foreign Trade and Economic Cooperation, which is MOFTEC, right?

A Yes.

Q Then it says Trade Administration, the Bureau of Quotas and License, Dalian Special Office.

And are those all Chinese government agencies, sir?

A Yes.

Q And then a copy of this was sent to the Tianjin Special Office. Is that a government agency?

A Yes.

Q And then to the Qingdao Special Office?

A Yes.

Q Is that a government agency?

A They're all government agencies.

Q So to cut this short -- if I can just lead this -- all of the recipients of a copy of these documents were agencies of the Chinese government, correct?

A Yes.

[712]Q And the copy, it says within the agency, that's chambers leaders, is that China Chamber of Commerce?

A Yes.

Q And the Western Medicine Division, that's what Mr. Qiao was directly working for?

A Correct.

Q Within the chamber?

A Correct.

MR. MASON: Could you put before him --

That's been admitted, correct, Your Honor?

BY MR. MASON:

Q Take a look, please, sir at Defendant's Exhibit 49.

A (Witness complies.)

Q Do you have that in front of you, sir?

A I do.

Q Your name is on this at the top?

A Yes.

Q And it's dated May 2004 in the upper right-hand corner?

A Yes.

Q Have you seen this before?

A Yes.

Q Is this something that was prepared by Weisheng?

A It's a proposal.

Q Was it prepared by Weisheng?

A Correct.

[713]MR. MASON: I offer it, Your Honor.

THE COURT: Any objection?

MR. ISAACSON: No objection.

THE COURT: 49 is received.

(Defendant Exhibit 49 is admitted into evidence.)

BY MR. MASON:

Q Please look at the third line -- fourth line, excuse me. Do you see it says in the fourth line, "Because of the SARS in 2003, VC, Vitamin C prices went straight up and for some time there was insufficient supply."

Do you see that, sir?

A I do.

Q Okay.

That was a correct statement, was it not?

A Yes.

Q In your opinion, sir, were there times when the chamber imposed industry coordination measures that talked about were not effective?

A My -- my viewpoint is if they contradicts the market price, then it will not be easy to follow.

Q And were there times when -- are you referring to supply and demand, for example?

A When there's a big fluctuation in supply and demand, then the minimum price requirement that they wanted could not be implemented.

[714]Q Okay.

Sir, you were asked questions this morning by counsel about -- about agreements that Mr. Qiao directed. So we're clear here. When Mr. Qiao directed the Vitamin C companies to make some -- or to do something in connection with either exporting or minimum price or putting product in a warehouse or shutting production, did the Vitamin C companies have a choice but to follow that under penalty of a sanction?

MR. ISAACSON: Objection.

THE COURT: Sustained.

BY MR. MASON:

Q Were there penalties that Mr. Qiao said would occur or would come to pass on Vitamin C manufacturers who did not follow instructions that he gave?

A He did.

Q And did these relate, among other things, to export quotas?

A Yeah, because exporting VC was like a lifeline of each enterprise. If he -- he restricted our export quantity,

that would be like the biggest punishment towards the enterprise.

Q Okay.

And would that also apply to instructions regarding production shutdown?

[715]A Yes.

Q And directions placing product in warehouses?

A Yes.

Q After 2002 and the imposition of verification and chop, did Mr. Qiao's authority with respect to giving instructions to the Vitamin C companies change at all?

A It did not change. Relatively speaking, his authorities were even higher than before.

Q After verification and chop or with verification and chop?

A Correct.

Q Did the concept of industry coordination change after verification and chop was implemented?

A No change.

Q Did the requirements of self-discipline change after imposition or implementation of verification and chop?

THE INTERPRETER: What was the question again?

BY MR. MASON:

Q After the implementation and verification of chop, then did the self-discipline requirements change?

A The requirements of chop towards the self-discipline of the industry did not change.

Q Were there Vitamin C meetings, Mr. Feng, where at the end of the meeting, no instructions were given by Mr. Qiao with regard to pricing or quotas or production stoppages and [716]the like?

A Every time it was according to his instruction. There was no -- no occasion that no instruction.

Q Okay.

But were there sometimes meetings where there was no agreement directed by Mr. Qiao, that he might have left it for a different day to implement an agreement?

A Yes. It all depends on the circumstances of the meeting. And if he felt that no agreement or consensus can be reached, then he may postpone it until next time.

Q At the end -- but was it always Mr. Qiao's decision as to whether or not to implement certain instructions?

MR. ISAACSON: Objection, leading.

THE COURT: Sustained on that and also vague.

BY MR. MASON:

Q Who was the decision maker at the Vitamin C committee meetings with regard to pricing and quotas and exports and production stoppages?

A It was Mr. Qiao's -- Mr. Qiao Haili who had the authority to decide.

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EXCERPT OF THE DIRECT EXAMINATION OF QIAO HAILI, HEAD OF THE VITAMIN C SUBCOMMITTEE, AND SIDEBAR, MARCH 4, 2013

* * *

[921]Q You mean after May 1, 2002?

A Correct.

Q And with respect to whether or not you could direct the companies to stop production, what authority do you have there?

A I could instruct them to stop production.

Q What authority, if any, did you have to penalize or punish the vitamin C subcommittee members, the distributors, if they did not follow your directions in these regards?

A I stopped the verification and chop so they could not export, and the export was their lifeline.

Q Did you have authority to stop their export?

A Stop what?

Q Did you have the authority to stop their export?

A I did.

THE COURT: You said "Woe ya" (Phonetic).

THE WITNESS: I did.

THE COURT: I thought he said didn't. He in fact said "I did."

Q Sir, can I direct your attention to Exhibit 9, Defendant's Exhibit 9. Mr. Qiao, did you have that exhibit in front of you?

A I do.

[922]Q Could you tell us what it is, please?

A This is the temporary specifications or rules with respect to penalizing low price exporters from the MOFTEC.

Q Where did it come from?

A MOFTEC.

Q Was it part of your job to know about this regulation?

A Yes.

Q Was it part your job to study the regulation?

A Yes.

Q Was it part of your job to understand how it worked?

A Yes.

Q Did you use this regulation in performing the duties of your office?

A Yes, I had to.

MR. MASON: I would offer this, your Honor.

MR. ISAACSON: Sidebar, your Honor? We object.

THE COURT: I think I know the arguments. The objection is sustained.

MR. MASON: Can we have a sidebar on this, your Honor?

THE COURT: Sure.

[923](Sidebar conference begins.)

THE COURT: I'll say again what I said at the last time: I want to know what the witness did, saw, heard and said. I am not putting translated Chinese legal documents in front of this jury, that was my determination, I made it in the 44.1.

What we're here on is the practical effect of what this witness thought he was able to do and what he, in fact, did, and whether the defendants reasonably believed that they had to do what he said. So I'm not -- I'm not allowing in the Chinese legal documents.

MR. MASON: Your Honor, may I cite your Honor's in order October 1. "Traditional sources of foreign law provides reliable evidence of the regulatory regime that governed defendants conduct, especially when supplemented with testimony from Mr. Qiao." And then you said, same order, page two, "regulatory regime which defendants operated is relevant to the jury's findings concerning defense of state action and sovereign compulsion." And this witness whose job it was to enforce restrictions testified that this he studied this, it was part of his job, he had to know about it to do his job, it's highly and directly relevant to what he's saying, your Honor, I think it's consistent with your order that you just read.

THE COURT: I don't think it is.

[924] MR. ISAACSON: May I say something about what your Honor said about this specific regulation? Because this is the regulation which the witness has already misstated, because this is the below cost pricing regulation, which is referred to as the low price, which is page 60 of the summary judgment decision that said it was

irrelevant to the defendants' agreement regarding output.

MR. MASON: Your Honor --

THE COURT: Right. I did rule it irrelevant, and that's why I'm not going to have the jury start determining what provision of Chinese law were applicable and what portions were not applicable. All the jury needs to know from this witness is he believed he was acting pursuant to Chinese rules and regulations, that's all that matters. And then they will determine, based on his belief and his communications with the defendants, whether there is a compulsion defense here. I'm not letting in the Chinese law in front of this jury.

MR. MASON: Your Honor, you started out at the sidebar saying you wanted to know more about the relationship with this document, so --

THE COURT: No, I don't think I did that.

MR. MASON: Well, I didn't mean to misstate what the court said, but --

THE COURT: What I said was as I said before, I [925] started out the sidebar like the last sidebar by saying this witness should be communicating to the jury what he saw, heard, did and said; that's his testimony, okay?

MR. MASON: Well, what he did, your Honor, and what he testified he did was implement this regulation and used it in his job. I mean, that's what he did.

THE COURT: I have no problem with his testimony that his thought was that he was acting in accordance with the Chinese legal requirements of his job. He can say that. The jury is not going to get involved in determining whether in fact Chinese law required him to do what he

did. Because as Mr. Isaacson points out, I already ruled the 1996 directive was not relevant as far as 2002, Mr. Mason.

MR. MASON: Thank you, your Honor. Your Honor, so we don't have this constant issue, because I don't want to burden the record here, but there are other regulations that we've identified in evidence.

THE COURT: Yes, I'm not letting in any of the Chinese legal materials. And to the extent that you marked them as exhibits, those are all being excluded.

MR. MASON: Well, there are different categories of them, but I'm not going to ask him about them in the testimony, but maybe later on you can hear us on that. I don't want to waive our objection to it by not asking about it.

[926]THE COURT: Well, it's up to the Second Circuit what you will or will not have weighed. I've given you direction on this one, which I think is out. I think from that you should be able to tell what's out.

The things that, for example, Professor Shen considered in his affidavit interpreting Chinese law are the things that I'm not going to place before the jury, because I don't want the jury doing what Professor Shen purported to do in which I did under 44.1.

MR. MASON: Well, may I ask what your Honor was referring to when you said "There was reliable evidence, the regulatory regime is relevant with the testimony of Qiao."?

THE COURT: It was relevant to my determination of Chinese law, and Mr. Qiao's testimony may or may not have helped me make that determination of Chinese law, but we are past that here, we're trying a compulsion defense.

MR. MASON: You said the regulatory regime in which the defendants operated is relevant to the jury's finding concerning the defenses of state action and sovereign compulsion." And you said we have wide latitude in trying to prove this and now you are blocking the regulations that are directly relevant.

THE COURT: Well, you know, I believe that by allowing Mr. Qiao to testify, that he believes he was acting pursuant to Chinese law and regulation, I have accomplished [927]what I intended to by that passage. To the extent that you think I'm not, and maybe you are right about that, I've revisited the issue, and I think it would be inappropriate to put Chinese legal materials in front of this jury.

MR. MASON: Okay. Thank you Judge.

(End of bench conference at 3:51 p.m.)

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EXCERPT OF THE CROSS-EXAMINATION OF QIAO HAILI, HEAD OF THE VITAMIN C SUBCOMMITTEE, MARCH 5, 2013

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[1022]Q Sir, I'm going to show you what's been marked as Plaintiffs' Exhibit 234.

You've seen this document before, right, sir?

A I have.

Q You wrote this document?

A Yes.

Q This was a report you wrote to the Ministry of Commerce?

A Correct.

Q Report is dated July 17th, 2003?

A Yes.

Q Okay. Ministry of Commerce made a request to your boss at the Chamber to do this report, right?

A Yes.

MR. MASON: Your Honor, can I -- object on leading. I don't know if Your Honor is going to deal with it.

THE COURT: It's cross-examination. Go ahead.

Q Ministry of Commerce asked you to make this report on [1023]the issue of credibility building, right?

A Yes.

Q All right. The Chamber of Medicine & Health Products put it on their Web site after you wrote the report, right?

A Yes.

Q Your boss approved putting this document on the Chamber of Commerce Web site, correct?

A Yes.

Q The Chamber had an approval process before Chamber records could be posted to the Web site, right?

A Yes.

Q And your boss' approval was part of that approval process?

A Yes.

Q Your boss would actually sign a form approving posting of this to the Web site, right?

A Yes.

Q Okay. And you also signed the form approving its posting to the Web site, right?

A Yes.

Q And this document was put on the Web site to describe for the public the work of the Chamber of Commerce?

A Yes.

Q You wanted to promote public and industry understanding of the work of the Chamber of Commerce?

[1024]A Can you repeat that.

Q Sure.

You wanted to promote public and industry understanding of the work of the Chamber of Commerce by posting this?

A Yes.

Q You even put a copyright -- or the Chamber even put a copyright notice on it, didn't it, at the end of the document after the date of July 17th, 2003?

A I don't see it.

Q I guess it's just in the English version. I won't keep you on that point.

MR. ISAACSON: I move to admit Exhibit 234.

MR. MASON: No objection.

THE COURT: It's received.

(Plaintiffs' Exhibit 234 received in evidence.)

THE COURT: Let me direct the interpreter to the line under the picture in the Chinese.

THE INTERPRETER: I see it.

MR. ISAACSON: All right. If we can put the document on the screen.

Q The document is titled "Suggestions to Establish a Credibility System."

A Yes.

Q And this was written -- this document was written in July 2003 before this lawsuit was filed in 2005, right?

[1025]A Yes.

Q And the first section of the report was titled, number one, "Work in industry self-regulation and credibility building."

A Yes.

Q And four lines down in the English -- I'm not sure about in the Chinese -- but in that paragraph, you wrote, that "the coordination of VC has yielded notable results through industry self-regulation, prices of Vitamin C exports have increased significantly."

That was your view at the time and what you reported to the Ministry of Commerce, right?

A Yes.

Q And then you went on to say that "from January of 2002 to May 2003, in comparison to the price of U.S. 2.80 kilograms at the end of 2001, VC exports brought in additional revenue of more than U.S. $63 million."

That was your view at the time and what you told the Ministry of Commerce?

A Assuming that the pricing was consistent, the same at $2.85 from January 2002 to May 2003, and we calculated these figures to illustrate the results. There's no way for me to give a scientific expression so I just assume that $2.85 was the price during that period.

MR. MASON: Your Honor, the document says 2.80. I [1026]don't know if it's a translation error or what.

THE INTERPRETER: I said 2.80, didn't I?

THE COURT: You did say 2.85.

MR. MASON: Can the record be so corrected?

THE COURT: Well, it is now.

MR. ISAACSON: All right.

Q The second topic in your report, number two, "Thoughts on the work of industry self-regulation and credibility building." And then item 3, "Suggestions to establish a credibility system."

Do you see Section 3, sir?

A I see it.

Q And what you wrote about the credibility system in 2003 is here. And you say, "The credibility system cannot be separated from industry self-regulation."

A Yes.

Q Then you go on to say, "However," in the second sentence, "the legal standing of Chambers of Commerce is still not clear." That was your view in July 2003?

A Because at the time it happened that enterprises did not comply with the instructions of the Chamber, and there's nothing the Chamber could do.

Q Exactly, sir. At this time, the enterprises were not complying with the instructions of the Chamber, your instructions, and there was nothing you could do about it?

[1027]A I'm talking about Penicillin industry, not VC industry. Because when the Penicillin industry did not comply, I had no recourse because I did not have the verification and chop process to control them.

Q Sir, in the first section, you gave the discussion about Vitamin C, didn't you?

A Which one?

Q The first section of your report.

A The first paragraph was referring to Vitamin C.

Q Didn't mention Penicillin, did it?

A I had already reported the circumstances with respect to Penicillin.

Q My question, sir, was about your report. Do you even use the word "Penicillin" in this report?

A No.

Q Didn't think so.

And what you said was to the Ministry, that "the legal standing of Chambers of Commerce are still not clear and that regulations and rules formulated by companies in the industry organized by the Chambers of Commerce lack legal basis."

A It all refers to the Penicillin industry.

Q Without mentioning Penicillin. And in fact, what you refer to are the rules and regulations formulated by companies in the industry organized by the Chamber of [1028]Commerce, right?

THE COURT: I think you should rephrase.

Q All right. You go on to say -- well, specifically here you were discussing, sir -- you were discussing here, sir, regulations and rules formulated by companies in the industry organized by the Chambers of Commerce.

A Yes.

Q And you say that they also -- it's also difficult to gain support from government departments, right?

A Correct.

Q You also say, "These rules and regulations simply become formality," end quote. Only "honest fellows will follow."

A Yes.

Q At the time you wrote this report in 2003, sir, you were telling the Ministry you did not have the power to enforce self-discipline measures, right?

A With respect to the Penicillin industry, I did not have the authority.

Q All right. Sir, you mentioned the deposition that took place over two days. Page 235, beginning at line 16. Trevor, could you play that for me.

(Videotape played.)

Q At your deposition, you told me it was right that you were telling the Ministry you did not have the power to [1029]enforce self-discipline measures. And you didn't say anything about Penicillin, did you?

A The fact that I did not mention at that time does not mean that I did not -- it did not refer to the Penicillin industry.

Q Okay. You gave me -- you told Mr. Mason, you understand what truthful testimony is, right?

MR. MASON: Your Honor, this is -- objection.

THE COURT: Overruled.

A I understand.

Q You gave truthful testimony at your deposition, didn't you, sir?

A Yes.

Q Now, in this report, you told the Ministry that when companies did not exercise self-discipline, you did not have any means of controlling the situation, right?

A Aside from Vitamin C.

Q Sir, can we -- your deposition, now we're at, Trevor, at 232, beginning at line 5.

I'm going to again show you what you said when I asked you that question at your deposition, sir.

(Videotape played.)

Q What you told me at your deposition, sir, was that you didn't have the authority to restrain -- no means of restraining the company, no means of sanctioning them, no [1030]means of controlling them. That's what you told me at your deposition, sir, without mentioning Penicillin.

A Just like I said earlier over there, I say if the government will supply certain means to us, it would have been better.

Q It wasn't just a matter of making it better, sir, was it? You told the government that your rules were simply a formality and only honest fellows will follow.

A If there was no controlling means, that's surely to happen.

Q And then you asked the Ministry, you said, we need legislation to define the legal status of the Chambers of Commerce.

A Yes.

Q And you said that when verification and chop was in place, right?

A Correct.

Q And there was no question about the legal status of the Ministry of Commerce in July of 2003, was there?

A The Ministry of Commerce?

Q It had clear legal status, right?

A Yes.

Q It wasn't like the Chamber?

A Right.

Q And then you told the Ministry, "We also need support [1031]from relevant government departments to assist Chambers of Commerce in asserting their authority.

A Yes.

Q And you said that you needed that support so that the Chambers of Commerce could punish companies.

A Yes.

Q Companies who have little credibility.

A Towards the companies that violated the self-disciplined regulations of the industry.

Q Exactly. You needed support from relevant government departments to punish companies who violated the self-discipline regulations of the industry.

A Yes, yes.

Q All right. And you wanted to honor those who are trustworthy. Those are the ones who do obey by themselves the industry agreements, right?

A Yes, yes.

Q Sir, you told defense counsel that you had the power to cut the lifeline of these companies. That was completely different from what you wrote the Ministry of Commerce in July 2003, right?

A With respect to Vitamin C, I had controlling means. The government supported me towards the Vitamin C. The difference from here. The other one, government gave me support, gave me means. These refer to the merchandise that [1032]I was not given authority to. Because the Chamber is not just regulating Vitamin C. There are many other merchandise.

Q None of what you're telling me now is what you wrote in July 2003, is it?

A In '03, what I wrote in this section was not referring to Vitamin C. The first section I was referring to the accomplishments of Vitamin C.

THE COURT: Mr. Isaacson, maybe you want to wrap up this line.

MR. ISAACSON: Yeah. I had one more question on this.

Q What you're telling me now is different from what you told me in your deposition, isn't it, sir?

A Basically the same. Not much different.

MR. ISAACSON: All right. Thank you, sir.

Q I want to talk to you about export volumes or quotas. It's your testimony, isn't it, that the Chamber did not use verification and chop to control export volume between March 2003 and July 2006?

THE INTERPRETER: You did not or you did?

MR. ISAACSON: You did not.

A Yes.

Q Let me just make sure I have it correct. Is it correct that you did not use verification and chop to control export [1033]volume between March 2003 and July 2006?

A Yes.

Q And you did not give instructions about the quantities for export of Vitamin C from March 2003 to July 2006?

A It just through establishing the warehouse and stoppage of production to control.

Q I'm talking about the quantities for export, sir. You did not give instructions about the quantities for export of Vitamin C from March 2003 to July 2006, did you?

A Yes.

Q And you did not give any directions at all for the quantity of exports for Vitamin C from March 2003 to July 2006?

A Yes.

Q For example, you did not give any directions to Mr. Feng about the quantity of Weisheng's exports from February 2003 to July 2006?

A Yes.

Q Okay. Now, from March 2003 to July 2006, it's your testimony that you only elected to control the minimum price and not the volume, right?

A Yes.

Q From March 2003 to June 2006, what you're saying is the only way you had to control the companies was verification and chop for a minimum price?

[1034]A Yes.

Q I want to talk to you -- and that's because there were no quotas the companies could lose after March 2003 until July 2006?

A I didn't hear clearly.

Q There were no quotas that the companies could lose from March 2003 through July 2006, right?

A I don't know what you mean by lose -- losing. There was no set quota.

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[1038]Q Thank you. From 2002 forward, there were no agreements on minimum price at Vitamin C subcommittee meetings that went forward without the support of a majority of the manufacturers, right?

A It was at my request I instructed them, requested them to do it that way.

Q My question is not about what you requested, sir.

It is correct that from 2002 forward, there were no agreements on minimum price at the Vitamin C subcommittee meetings that went forward without the support of a majority of the manufacturers?

A That's true.

Q It's also true, isn't it, sir, that from 2002 forward there were no agreements on export quotas or quantities at Vitamin C subcommittee meetings that went forward without the support of a majority of the Vitamin C manufacturers?

A No, that happened. For example, like in '01 when we were trying to resolve the quota issues, all the enterprises were having big arguments. And so eventually the Chamber forced the issues for the allocation.

Q We'll talk about 2001 a little later. From 2002 forward, there were no agreements on export quotas or [1039] quantities at Vitamin C subcommittee meetings that went forward without the support of a majority of the Vitamin C manufacturers, correct?

A Whether there was agreement or not depended on the circumstances. It's not that every meeting we had to come to some agreement. And when the market was rather stabilized, I did not require them to come to any agreement. When they disagreed and I have stipulated the price as well. For example, 9.20, they didn't agree.

Q Sir, I want to show you a section of your deposition. Line 280 -- page 280, beginning at line 12, Trevor.

(Videotape played.)

Q That was truthful testimony, wasn't it, sir?

A Yes.

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EXCERPT OF PROCEEDINGS BEFORE THE EASTERN DISTRICT OF NEW YORK, MARCH 5, 2013

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[1040]THE COURT: Anything we need to talk about?

MR. MASON: Yes, Your Honor.

THE COURT: Be seated, please. The witness may step down.

(Witness exits the courtroom.)

MR. MASON: Respectfully, Your Honor, I don't want to beat a dead horse, but I want to ask Your Honor to revisit your ruling yesterday about not giving them regulations and laws. We heard counsel just now hammer the witness on your authority and whether there was a law and whether or not the MOFCOM directed you to undertake these actions with regard to Vitamin C. And the regulations give him the authority and say it's there.

So what he's trying to do, and I can see why, of course, is he wants to keep out the regulation and then suggest to the jury he didn't have the power to do this or it wasn't enforceable; in fact, when there are laws that say it was enforceable and you're not letting us put those in.

And quite frankly, Your Honor, it's just not fair. We're litigating this case with one arm behind our back if [1041]you keep these regulations out when counsel is arguing that he had no authority and I can show it that are very clearly before the Court. And I think we ought to be able to put those in evidence because he opened it up and he raised it. You can't have it both ways.

MR. ISAACSON: Your Honor, with your permission, Mr. Mason was allowed to ask this gentleman questions about his understanding of his authority and what he communicated to people about his authority. I talked to him about the document and asked him about what his understanding of his authority was in 2003 and what he said about his authority. I didn't put any rules or regulations or debate with him about whether he was right or wrong.

But it was fair game to reply to the testimony about what he understood his authority was and what he said his authority was.

MR. MASON: Your Honor, of course, he didn't put those regulations in. My point is that he cross-examined him on an area where we have contrary evidence and you won't let that in, at least you didn't as of yesterday. And he ought not to be able to do that. He ought not to be able to bring out testimony which we know is contradicted by the law of China and you, Your Honor, hasn't let that in. It's just not right.

MR. ISAACSON: Your Honor, you've already ruled [1042]that the written laws of China do not require compulsion.

MR. MASON: Your Honor, that's the evidence -- excuse me. As I understand it, that's the fact that this jury is going to decide. And that's what Your Honor said and we ought to -- if he's going to raise this point and argue this, then we ought to be able to put these rules in. He should not be able to have it both ways. It's terribly prejudicial and unfair.

THE COURT: I don't think he's having it both ways. The point is, there may have been certain legal directives on the books. All Mr. Isaacson did was show the witness a memo that says I don't have the power I need or at least it could be argued to the jury that it says that.

MR. MASON: But, Your Honor --

THE COURT: That's his feeling. That's what he was cross-examined on. It goes to his credibility. It did not go to the actual legal state of affairs.

MR. MASON: This is a big setup. He gets you to say we can't get these rules and regulations in, and now he's suggesting to the jury by this testimony or he's trying to that those rules and regulations don't exist when they do.

THE COURT: He is not suggesting that.

MR. MASON: Of course he is, Your Honor.

THE COURT: No, I don't think he is. He is asking [1043]for the witness' own understanding of what legal -- what abilities he had to enforce verification and chop. His own understanding, independent of what may have been out there in the law.

MR. MASON: Respectfully, Your Honor, these documents that we want to put in evidence support the view -- the proposition that he had the authority and the backing of the government to do this. And the impression that Mr. Isaacson wants to leave is that he didn't have it. So we're quibbling now whether it was Penicillin or some other product. The fact is we nail it with these documents. And keeping them out -- you talk about 403. It's highly prejudicial to us to keep them out because they directly contradict what counsel's arguing.

THE COURT: All right. I don't think they do, and I think you're merging the legal regime with this witness' knowledge and understanding of what he did. The trial is about what he did. I have allowed you, I have not curtailed you, from asking him whether in his view he thought under the regulatory regime he had the power to impose pricing and export quotas. And he has told you on your direct examination that under that regime, he thought he did. Mr. Isaacson has shown him a memo that tends to undercut that.

MR. MASON: Your Honor, the witness testified that [1044]he drew his authority for performing his duties from these rules and regulations. Among the authorities that he drew was the right to punish people and the right to do what he's doing. And Mr. Isaacson is leaving the jury with the impression, or wants to at least -- and he's certainly going to argue this in closing, you can bet on it -- that he didn't have that authority when we have a document that says clearly more than ever that he had the authority from the government.

THE COURT: Your problem is you have words out of the witness' own mouth saying he doesn't have the authority.

MR. MASON: No, Your Honor. No, no, to the contrary. He testified he did have the authority.

THE COURT: And you can argue that to the jury.

MR. MASON: But, Your Honor, why am I limited given what --

THE COURT: Because the jury, as I told you, cannot determine what Chinese law is.

MR. MASON: Your Honor --

THE COURT: Mr. Mason, I've heard you. I'm adhering to my ruling.

MR. CRITCHLOW: May I approach this from a slightly different angle?

THE COURT: You can try.

MR. CRITCHLOW: Okay. I heard the witness testify [1045]that he was talking about Penicillin when he wrote that.

THE COURT: Correct.

MR. CRITCHLOW: And Mr. Isaacson is asking questions about Vitamin C or about verification and chop generally. This regulation clearly lists the products that are under verification and chop. And Penicillin is not one of them.

THE COURT: I know. I see. Penicillin is omitted.

MR. CRITCHLOW: Penicillin is not omitted. It's not covered. It's not covered.

THE COURT: Right. So Vitamin C is listed in the regulation.

MR. CRITCHLOW: Vitamin C is listed and Penicillin is not. It's exactly what the witness is saying.

MR. ISAACSON: They can ask him the question, is Penicillin covered by verification and chop? You don't need to show a law and regulation on it.

MR. CRITCHLOW: I think there's a difference between the witness testifying from the stand where the

jury has to assess his credibility and the written terms of the regulation itself, which unquestionably show what is covered and what is not.

THE COURT: I might allow a redacted version of the regulation, a heavily redacted version, that would [1046] simply show nothing more than there is a regulation authorizing verification and chop as to Vitamin C, but not as to Penicillin. You have to cut it to an absolute minimum in order to do that, but on redirect, if there is such a document, I will let him have that.

MR. CRITCHLOW: Thank you.

MR. MASON: Thank you.

MR. ISAACSON: We would stipulate the verification and chop does not cover Penicillin.

MR. MASON: No.

THE COURT: Well, let's talk about that. Let's talk about that.

Will you also stipulate that there is a regulation issued by the Chinese government that requires verification and chop for Vitamin C and a number of other products and not Penicillin?

MR. ISAACSON: Let me look at that over lunch because we had other critiques of that regulation.

THE COURT: Okay. Well, that's why I'm saying a heavily redacted form. Simply to show the fact that I've suggested could probably be stipulated to.

MR. CRITCHLOW: Let me just address a relevant point to that, it's Defendants' 31, which is that I think

that the full list of the regulation gives an important kind of context because we're not talking about thousands of [1047]products that are subject to verification and chop. We're talking about a handful of products.

THE COURT: I'll let you have in as part of the redaction.

MR. CRITCHLOW: So that the jury can see that when the witness was writing his memo, there are hundreds of products that are out there and he could be talking about those with the verification and chop regime only covering a few.

THE COURT: I understand what you're saying. And I will allow the list as part of the redaction showing the absence of Penicillin and the presence of Vitamin C plus other products to come in. What I will not allow is a lot of legal-ese language that's in the regulation that goes beyond that and appears to give it force of law or what the enforcement mechanisms are or anything like that.

MR. CRITCHLOW: I understand you completely, Your Honor. I was just making the point that a stipulation doesn't quite get at the point that I was making. The list does.

THE COURT: Well, you might include the list in the stipulation. I will allow the parties to try to work that out over lunch. If not, I will look at the redaction that you'll prepare for me and see if that works.

MR. CRITCHLOW: That's fine.

[1048]THE COURT: Okay.

(Luncheon recess taken.)

EXCERPTS OF THE CROSS-EXAMINATION OF QIAO HAILI, HEAD OF THE VITAMIN C SUBCOMMITTEE, MARCH 5, 2013

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[1059]Q Now, I want to ask you about vitamin C subcommittee meetings before the lawsuit was filed.

A Yes.

Q Before the lawsuit was filed, during vitamin C subcommittee meetings, you could see individuals from the companies who attended taking notes or minutes, right?

INTERPRETER: You received.

THE COURT: Could see.

A Yes.

Q And in fact, you could see individuals from all of the companies attending the meetings taking notes.

A Yes.

Q In fact, you remember individuals from Weisheng taking notes and minutes during the meetings?

A I never look at it that closely.

Q But you could see that the individuals from Weisheng were [1060]writing notes or minutes, right?

A Yes, I did.

Q You also remember individuals from Hebei Welcome, taking notes or minutes during the meetings?

A I didn't pay too close of attention.

Q Well, in fact, sir, you do remember that individuals from Hebei Welcome did take records during the meetings, although you don't remember the names of the individuals.

A I didn't notice that too closely.

Q Trevor, page 53 of the deposition, 10 through 15.

(Exhibit played.)

Q That testimony was truthful and correct, wasn't it, sir?

A It was true.

Q Now, and you don't know what happened to the notes of these companies, right?

A That I don't know.

Q Now, after this lawsuit was filed, if you saw anybody from a company taking notes at meetings, you told them to tear them up, right away.

A I did not allow note taking.

Q Well, in fact if you saw someone taking notes, after the lawsuit was filed, you told them to tear it up, right?

A Correct.

Q So there were notes that were torn up?

A I told them that I did not allow note taking.

[1061]Q And then they tore up their notes?

A No note taking was allowed.

Q And after you told them to tear up their notes, they did that?

A If they did take notes, then it would be torn apart.

Q And you gave these instructions because of the existence of this antitrust case?

A Yes.

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[1078]Q Sir, you spent sometime testifying about the 1997 charter.

A Yes.

Q Which is DX 11, which you should have in front of you.

To assist you, it is over in this book. I will give you a loose copy marked as PX 73, this is the 2002 chart.

INTERPRETER: 2002.

Q So, you have in front of you the 1997 charter, and the 2002 charter, right?

A Yes.

Q You are very familiar with both of these documents, I think is your testimony?

A Yes.

Q Now, we put together a little comparison of these documents and I want to ask you about whether we have got these things right.

The first one at the top Article 2, you have to look at-- I will ask you to look at Article 2 of the 1997 charter. That provides that an industrial organization, organized upon approval by the MOFTEC, and under the leadership of the chamber by those member enterprises, right? You have got the Chinese versions to refer to.

INTERPRETER: Yes.

[1079]Q Now, that provision of the 1997 charter did not become part of the 2002 charter, instead the 2002 charter said the subcommittee is a self disciplinary trade organization jointly established on a voluntary basis by members of the Chamber of Commerce engaging in vitamin C import and export business in Article 3.

That was a change that was made between the 1997 charter and the 2002 charter, right?

A It was changed.

Q Article 6 of the 1997 charter, sir. The subcommittee will make proposals on the export development plan and annual export quota allocation, supervise the implementation, export license by member enterprises and advises on allocation adjustment of export quota and issuance of export license.

That provision was not put into the 2002 charter, was it, sir?

A Yes.

Q Article 7 of the 1997 charter. The subcommittee shall coordinate and administrate market, price, customer and operation order of vitamin C export.

A Yes.

Q That provision was not put in the 2002 charter, was it?

A The fourth item, the number four item in the 2002 charter has that content.

Q By the fourth item, are you referring to Article 4?

[1080]A Yeah, the Article 4. Article 4.

Q But with very different language, right?

A Right.

Q Now, Article 4 in fact says, the subcommittee is going to protect fair competition, right?

A Yes.

Q Article 10 of the 1997 charter, which if my memory is correct, you looked at with defense counsel, it talks about the subcommittee shall hold meetings and one of the things they are going to hold meetings about is to analyze and work out coordinated prices for vitamin C export, to supervise and inspect the implementation of such coordinated export prices set by the subcommittee. That is Article 10 in 1997, right?

That provision was not included in the 2002 charter, was it?

A Article 7 expresses something similar. Article 7.

Q Something similar, sir, it has got completely different language, doesn't it?

A There is expressed differently.

Q All it says in Article 7, is the subcommittee introduces the state economic and trade laws, regulations, guidelines and policies to the members and guides and supervises the members to operate their businesses in accordance with the law.

A Number eight, Article 8. Sorry.

Q Let's look at Article 8.

[1081]Article 8 makes no reference to coordinated export prices, does it?

A The fact that it's not written doesn't mean that that is not done. It was still done.

Q The 1997 charter expressly talks about coordinating export prices, the 2002 charter did not mention it, isn't that right?

MR. MASON: Your Honor, objection. That misstates the charter.

THE COURT: Overruled.

A It was not written.

Q Article 12, sir, of the 1997 charter, this is the section on members.

Article 12 says, only the members of the subcommittee have the right to export vitamin C and are simultaneously qualified to have vitamin C export quota.

A Yes.

Q That provision was not included in the 2002 charter, right?

A Yes, situations change already.

Q Exactly.

If I can ask you to look at the 2002 charter, Article 16, little item eight.

That provides for freedom to withdraw from the subcommittee, right?

[1082]A Yes.

Q That freedom was not included in the 1997 charter, was it, sir?

A No.

Q Article 15 of the 1997 charter, sir. There is an item one, these are all members' obligations.

A Yes.

Q Item one, to comply with various directives, policies and regulations with respect to foreign trade.

Item five, reports vitamin export of previous two months. I think you were asked about that.

Item six, strictly execute export coordinated price set by the Chamber and keep it confidential. I think you were asked about that.

Those provisions didn't-- were not put into the 2002 charter, were they?

A Yes.

Q All right. Let me ask you about the penalty provision of the 1997 charter. I think you may have been asked about this.

Article 16. The subcommittee will suggest to the competent governmental department through the Chamber to suspend and even cancel the vitamin C export right of such violating member.

Article 16. The last sentence.

INTERPRETER: Last sentence?

[1083]MR. ISAACSON: Yes.

A Yes.

Q Now, if you look at the penalty section of the 2002 charter, that is Article 19-- at the bottom of Article 19.

Do you see where it says there, after one, two, three and four, the disciplinary actions of the subcommittee include circulation of notice of criticism, issuance of warning, temporary suspension of membership or cancellation of membership. Punishment must be approved by the council of the subcommittee.

A Yes.

Q That is how the penalties provisions changed, right?

A Yes.

Q Just be patient with me, sir. A few more provisions that were discussed.

Article 18, section five of the 1997 charter. This is in the section on the functions of the members meeting.

Number five, function is to discuss and set export coordinated price, do you see that?

That was not--

A I see it.

Q That was not a function of the members meeting in the 2002 charter, was it?

A Doesn't mean it is not there.

Q Well, it does mean it is not actually in the 2002 [1084] charter, does it?

A Yes.

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EXCERPTS OF THE RE-CROSS-EXAMINATION OF QIAO HAILI, HEAD OF THE VITAMIN C SUBCOMMITTEE, MARCH 7, 2013

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[1229](Plaintiff's Exhibit 252 received in evidence.)

BY MR. ISAACSON

Q If we could show 252 on the screen.

Now, this is about penicillin, sir, so I'm not going to go through it blow by blow here.

In the second paragraph there is a reference to the chamber of commerce convened that penicillin discussion forum and then a summit and there's two dates, July 31st, 2003 and September 29th, 2003, do you see that?

A Yes.

Q And then it says both meetings studied and discussed the implementation enforcement of the industry self discipline and the cooperative negotiations were able to reach a common agreement. And then it lists manufacturers who signed the agreement.

A Yes.

Q So the agreement was signed after the summit on [1230] September 29th, is that right?

A Yes.

Q And I see North China Pharmaceutical Group Corporation is one of the signatories. Were they a member of the chamber?

A No.

Q So you could be a member of the subcommittee without being a member of the chamber?

A No. He is not a member of the chamber either.

Q Okay.

You're saying the company was not a member of the subcommittee or the chamber but it was part of the agreement?

A Right.

Q All right. And then in the second to last paragraph there's -- it talks about the chamber of commerce convened another discussion forum on December 2nd, 2003, do you see that?

A Yes.

Q And it says that due to one company's non-compliance the meeting was unable to reach a consensus?

A Yes.

Q All right.

And that -- that's the -- that's the company that you were talking about in your testimony breaking the [1231] agreement?

A Yes.

Q And that took place after September 29th, 2003 and sometime before this meeting on December 2nd?

A Yes.

Q And then in the last paragraph that's where you criticize the company?

A Yes.

Q And you weren't worrying about courtesy at that point, right?

A Because he hurt the entire industry. And if agreement was reached it would be another cordial agreement. And if it was -- it was actually implemented then it would be another cordial agreement.

Q Okay.

Sir, the penicillin agreement that you testified about happened on or after September 29th of 2003. The breaking of that agreement happened after September 29th, 2003?

A Afterwards.

MR. MASON: Your Honor, may we have a brief sidebar.

(Sidebar begins.)

[1232]THE COURT: How much further are you going to go?

MR. ISAACSON: One or two more questions.

MR. MASON: Your Honor, I didn't know where he was going but it's clearly beyond the scope.

THE COURT: He went into a memo that referred to Vitamin C and the witness then said no, I was really talking penicillin. Then I let you get in the exhibit on

penicillin. Now he's allowed a little leeway, you know --

MR. ISAACSON: I'm almost done.

THE COURT: On recross to show that penicillin is not what penicillin purports to be.

MR. MASON: That's not where he's going.

MR. ISAACSON: Yes, it is.

MR. MASON: I think he's going on NCP.

THE COURT: No. He's contrasting penicillin, your view with his view. So let's have a couple more questions and let's get through it.

(Sidebar ends.)

[1233]THE COURT: Continue, please.

BY MR. ISAACSON

Q Sir, the penicillin agreement that you testified about happened after September 29th, 2003?

A Correct.

Q The breaking of that agreement happened after September 29th, 2003?

A No.

Q The breaking of the agreement happened after September 29th?

A Yeah, afterwards.

Q And the memo that you wrote to the Ministry of Commerce said you lacked legal authority, that you told

me was about penicillin was dated July 17th, 2003. That memo was written before the penicillin agreement and the breach of the penicillin agreement, right?

A Yes.

MR. ISAACSON: Have no further questions.

MR. MASON: I have one.

REDIRECT EXAMINATION

BY MR. MASON:

Q Sir, does the document you were just asked about have anything to do with Vitamin C?

A No.

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SELECTED EXHIBITS FROM DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, FILED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

EXCERPTS OF REPORTS OF THE PANEL: CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS, DATED JULY 5, 2011

WORLD TRADE ORGANIZATION

WT/DS394/R
WT/DS395/R
WT/DS398/R

5 JULY 2011
(11-3179)

CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

Reports of the Panel

[TABLES INTENTIONALLY OMITTED]

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F. EXPORT LICENSING

7.862 The complainants have raised several challenges to China's export licensing framework through which China administers exports of forms of manganese and zinc and through which China administers exports quotas

on forms of bauxite, coke, fluorspar, silicon carbide and certain forms of zinc.[1225]

7.863 The complainants submit that China's export licensing requirement for these raw materials is "non-automatic" and amounts to a restriction on exportation additional to the restriction effected by export quotas themselves. That additional restriction, they argue, is inconsistent with Article XI:1 of the GATT 1994.

7.864 The United States and Mexico submit that China restricts the exportation of the raw materials at issue through an export licensing system that is "non-automatic" in "nature".[1226] They submit that China has itself conceded that its export licensing system amounts to an export restriction under GATT Article XI:1.[1227] The European Union submits that China's export licensing system as set forth in relevant measures is "non-automatic by law"[1228] and is therefore inconsistent with Article XI:1.

1225. The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

1226. United States' first written submission, paras. 338-339, 342.

1227. United States' second written submission, para. 378 and Mexico's second written submission, para. 383, referring to Committee on Market Access, Note by the Secretariat: Notifications of Quantitative Restrictions G/MA/NTM/QR/1Add.11 (11 April 2008) (Exhibit JE-171) and Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final) (Exhibit JE-172).

1228. European Union's first written submission, para. 317.

7.865 The complainants submit that China's export licensing system is also inconsistent with Article XI:1 because it provides China's export licensing agencies with discretion to restrict exportation of the raw materials at issue.

7.866 The United States and Mexico assert that China's export licensing system "provides China with the authority, the ability and the discretion to control and restrict the exportation of the subject products."[1229] They argue that licensing agencies may exercise discretion to set the quantities of goods that can be exported, the price at which products can be exported, and the qualifications that exporters must possess; moreover, they can impose other conditions, such as requiring "undefined 'documents of approval' and 'other materials to be submitted' as bases for issuance of export licences".[1230]

7.867 The European Union argues that China's export licensing system "allows China's authorities a very broad and unfettered discretion on whether to grant or refuse export licences to applicants".[1231] It submits that there is no limitation on the discretion on the part of the Ministry of

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1229. United States' oral statement at the second substantive meeting, para. 122; see also United States' second written submission, para. 377; Mexico's second written submission, para. 382 (stating that "the licensing system provides China with the authority and the ability to control and restrict, i.e., impose limiting conditions, on products designated for export restriction").

1230. United States' first written submission, para. 340, fn. 415; Mexico's first written submission, para. 343, fn. 415.

1231. European Union's first written submission, para. 319.

Commerce to require undefined "other documents"[1232] or "documents of approval"[1233], which allows China's export licence agencies to restrict, or altogether ban, exportation by certain companies.[1234]

7.868 In its first written submission, the European Union additionally argued that China's licence issuing authorities could restrict or prohibit the exportation of the raw materials at issue by exercising discretion to interpret undefined "management qualifications" in a discriminatory fashion.[1235] In response, China contested the European Union's translation of the term, arguing the term should be translated as "business qualifications".[1236] In addition, China submitted that its licence issuing authorities have no discretion whatsoever in interpreting the meaning of this term and explained that applicants must simply submit one of the documents set out in Article 6 of the Working Rules on Issuing Export Licences once a year to show that the applicant is qualified and

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1232. European Union's first written submission, para. 319; *2008 Export License Administration Measures*, Article 11 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

1233. European Union's first written submission, para. 321; *2008 Export License Administration Measures*, Article 11 (Exhibits CHN-342, JE-74).

1234. European Union's first written submission, paras. 319, 321.

1235. European Union's first written submission, para. 320, referring to *2008 Export Licensing Working Rules*, Article 8.

1236. China's first written submission, para. 786.

registered to do business in China.[1237] Following China's explanation, the European Union indicated that it "accepts" China's "official declaration" in Exhibit CHN-345 that the fulfilment of the "business qualifications" condition simply requires "submission of the applicants' Business Licence and the certificate showing that the applicants are authorised to engage in import and export trade".[1238] (The European Union maintains, however, that China has acted inconsistently with GATT Article X:1 by failing to publish the "method of verification of the 'business qualifications' criteria"[1239]). In light of further clarification by the European Union of its Article XI:1 claim, and in light of the Panel's determination that the European Union's Article X:1 claim in respect of export licensing is outside its terms of reference, the Panel will not consider further the European Union's claim in connection with the requirement to demonstrate "business qualifications" in Article 8 of the Working Rules on Issuing Export Licences.

7.869 In addition to their claims under GATT Article XI:1, the complainants submit that requirements imposed under this export licensing system are inconsistent with paragraphs 162 and 165 of China's Working Party Report. They argue that these paragraphs contain "enforceable

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1237. China's first written submission, paras. 786-787.

1238. European Union's second written submission, para. 87; European Union's response to the Panel question No. 59 following the second substantive meeting paras. 81-83.

1239. European Union's response to the Panel question No. 59, following the second substantive meeting para 83.

commitments"[1240] and prohibit China's imposition of "non-automatic export licensing and export restrictions" that are not justified.[1241]

7.870 The European Union further contends that China's export licensing system is inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol, read in combination with paragraphs 83 and 84 of China's Working Party Report. The European Union submits that, under these provisions, China is required to grant the right to export to all enterprises in China, including foreign ones, and to eliminate its system of examination and approval of enterprises' rights to export. The European Union submits that the discretion by China's licence issuing authorities to refuse to grant export licences is tantamount to a system of examination and approval of trading rights.[1242]

7.871 Finally, the European Union claims in the alternative that China failed to publish regulations and rulings connected with the administration of its export licensing system in contravention of GATT Article X:1, and that China administers its export licensing system in a manner inconsistent with GATT Article X:3(a). The Panel determined, however, in Section VII.A.3 au-dessus, that the European Union's alternative claims under Articles

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1240. United States' first written submission, para. 343; Mexico's first written submission, para. 346.

1241. United States' first written submission, paras. 345-346; European Union's first written submission, paras. 323-324; Mexico's first written submission, paras. 348-349.

1242. European Union's first written submission, paras. 334-336.

X:1 and X:3(a) are not in the Panel's terms of reference.

7.872 China requests the Panel to reject the complainants' claims. First, China argues that it no longer subjects exports of fluorspar to an export quota under the 2010 Export Licensing Catalogue; hence, it argues that the Panel should not consider the complainants' claims in respect of fluorspar.[1243]

7.873 China also contends the its export licensing agencies may not exercise discretion to refuse an export licence application for forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc at issue, when the requisite application and documents are submitted. China argues that in all cases export licensing authorities "automatically" grant export licences within three days following submission of a valid application and specified documents.[1244] Accordingly, China argues that its export licensing system does not restrict exportation in a manner inconsistent with either Article XI:1 of the GATT 1994 or any obligations in paragraphs 5.1 and 1.2 of China's Accession Protocol, or with paragraphs 83 and 84, or 162 and 165 of China's Working Party Report.

7.874 If the Panel were to find China's export licence requirement inconsistent with Article XI:1, China requests that the Panel exercise judicial economy with respect to the complainants' remaining claims under its Accession Protocol and Working Party Report. China considers that

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1243. China's first written submission, para. 67.

1244. China's first written submission, paras. 771, 776; China's second written submission, para. 499.

these claims are "identical" to those under Article XI:1 and submits that findings under these provisions "would add nothing to the resolution of this dispute, nor would it aid in any potential implementation."[1245]

7.875 In addition, China asserts that the United States and Mexico have abandoned their claims that China's export licence requirement is inconsistent with paragraphs 162 and 165 of its Working Party Report by failing to identify these provisions when asked by the Panel to list "all measures relevant to this dispute for which they are seeking 'recommendations' from the Panel".[1246]

7.876 As a preliminary matter, the Panel recalls its finding in paragraph 7.33 au-dessus that, in general, measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.[1247] At the request of the complainants, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures do not set a quota for fluorspar.

7.877 Before turning to an analysis of the parties' claims, the Panel wishes to address first China's contention that the United States and Mexico abandoned their claims with respect to paragraphs 162 and 165 of China's Working Party Report, mentioned above. The Panel observes that

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1245. China's first written submission, paras. 808, 881.

1246. China's second written submission, paras. 477-478.

1247. The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

China is correct in that the United States and Mexico did not list their claims under paragraphs 162 and 165 of China's Working Party Report when identifying, in response to the Panel's request, the measures and claims for which they are seeking recommendations.[1248] The United States and Mexico did, however, identify these provisions in their Panel Requests. They also addressed these claims in their first written submissions. In addition, the United States submitted Exhibit US-1 during the second substantive meeting of the parties, which refers to paragraphs 162 and 165 in connection with export licensing. In our view, the United States and Mexico have governed themselves in the course of these proceedings as if these claims were very much active ones, and we do not consider them as abandoned. The more appropriate conclusion is therefore, that the omission of these claims in response to a question from the Panel was merely an oversight. The Panel accordingly concludes that the United States and Mexico did not intend to abandon their claims with respect to Paragraphs 162 and 165 of China's Working Party Report, and accordingly will consider these claims below.

7.878 The Panel will first set out its understanding of the operation of China's export licensing systems for the raw materials at issue It will then analyze the claims of the parties. Finally the Panel will address, as relevant, China's request that the Panel exercise judicial economy with respect to claims under China's Accession Protocol and Working Party Report.

1248. Complainants' responses to first set of Panel questions, question No. 2.

1. The operation of China's export licensing system

7.879 China's Import and Export Regulations define "export licences" as "the various kinds of certificates and documents that are of export nature as provided in laws and administrative regulations".[1249] The exportation of goods from China is unrestricted unless otherwise provided for by law or regulation.[1250] China's *Foreign Trade Law* distinguishes between goods that may be freely exported (Article 15) and goods that may be restricted (Article 19). Goods that are freely exported pursuant to Article 15 may be subject to automatic licensing for monitoring purposes.[1251] Goods that are subject to restriction pursuant to Article 19 may be subject to licensing as "goods subject to ... export restriction".[1252]

7.880 For those goods subject to export restriction, an exporter may proceed to export only after obtaining an export licence for presentation to China's customs for declaration and examination.[1253] Export licences are

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1249. *Regulation on Import and Export Administration*, Article 43 (Exhibit JE-73).

1250. *Foreign Trade Law*, Article 14 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 4 (Exhibit JE-73).

1251. *Foreign Trade Law*, Articles 15, 16, 17 (Exhibit JE-72).

1252. *Foreign Trade Law*, Article 19 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73); *2008 Export Licence Administration Measures*, Article 2 (Exhibits CHN-342, JE-74).

1253. *Regulation on Import and Export Administration*, Article 43 (Exhibit JE-73); 2008 Export Licence Administration Measures, Article 6 (Exhibits CHN-342, JE-74).

generally valid for up to six months and expire no later than 31 December each year.[1254] The period of validity may be extended if an export licence is not fully used.[1255] For those goods that are simultaneously subject to export quotas, applications for licences must be made within the period of validity of the quota.[1256]

7.881 China's MOFCOM, through its Bureau of Quota Licence, is responsible for the application of export licensing rules and for coordinating export licence issuing agencies that are organized in local administrative authorities.[1257] MOFCOM is responsible for imposing penalties on enterprises that do not comply with exportation licence requirements. Exportation of restricted goods without approval, or exportation in excess of a designated quota, is subject to investigation leading to potential criminal and administrative penalties. Penalties include invalidation of applicable licences and suspension or revocation of the right to engage in foreign trade for a period of up to three

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1254. *2008 Export Licence Administration Measures*, Article 30 (Exhibits CHN-342, JE-74). According to this provision, the Ministry of Commerce may adjust the period of validity for certain goods based on "specific circumstances."

1255. *2008 Export Licence Administration Measures*, Article 31 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules*, Articles 17, 18, 19 (Exhibits CHN-344, JE-97).

1256. *2008 Export Licence Administration Measures*, Article 28 (Exhibits CHN-342, JE-74).

1257. *2008 Export Licence Administration Measures*, Articles 4, 5 (Exhibits CHN-342, JE-74); *Measures for Administration of Licensing Entities*, Article 4 (Exhibits CHN-385, JE-75).

years.[1258] MOFCOM also subjects licensing entities to penalties for issuing licences to exporters in excess of a quota, or in cases where no quota is set. Penalties include warnings and suspension or termination of the right to issue licences.[1259] Individuals working in licensing entities who issue licences without approval may also be subject to criminal and administrative penalties, including removal from employment, warning, demotion, and dismissal.[1260] MOFCOM may also punish the forging, altering without approval, buying and selling of export licences.[1261]

7.882 MOFCOM together with China's General Administration of Customs publishes the Catalogue of Goods subject to the Administration of Export Licences,(Export Licensing Catalogue) which lists all goods subject to export restriction.[1262] This catalogue is

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1258. *Foreign Trade Law*, Articles 61, 64 (Exhibit JE-72); *Regulation on Import and Export Administration*, Articles 64, 65 (Exhibit JE-73).

1259. 2008 *Export Licence Administration Measures*, Articles 21, 36, 38 (Exhibits CHN-342, JE-74); *Measures for Administration of Licensing Entities*, Articles 40 (Exhibits CHN-358, JE-75).

1260. 2008 *Export Licence Administration Measures*, Article 42 (Exhibits CHN-342, JE-74) *Measures for Administration of Licensing Entities*, Articles 40 and 41 (Exhibits CHN-358, JE-75).

1261. *Foreign Trade Law*, Articles 34, 63 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 66 (Exhibit JE-73); *2008 Export Licence Administration Measures*, Article 39 (Exhibits CHN-342, JE-74); *Measures for Administration of Licensing Entities*, Articles 40, 41, 42 (Exhibits CHN-358, JE-75).

1262. *Foreign Trade Law*, Article 18 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 35

published annually at least 21 days before the list takes effect, which is on 1 January of each year.[1263] MOFCOM approves exportation of goods listed in this catalogue.[1264]

7.883 On 10 December 2008, MOFCOM published the *2009 Export Licensing Catalogue* announcing the catalogue of export-restricted goods for 2009. The list includes the specific forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc that have been identified by the complainants in Exhibit JE-6.[1265]

7.884 Under China's *Export Licence Administration Measures*, enterprises seeking a licence to export

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(Exhibit JE-73), *2008 Export Licence Administration Measures*, Article 3 (Exhibits CHN-342, JE-74).

1263. *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73), *2008 Export Licence Administration Measures*, Article 3 (Exhibits CHN-342, JE-74).

1264. *Foreign Trade Law*, Article 19 (Exhibit JE-72).

1265. *2009 Export Licensing Catalogue* Notice (Exhibit JE-22); see United States' first written submission, para. 98; European Union's first written submission, para. 168. MOFCOM published *the 2010 Export Licensing Catalogue* announcing the catalogue of export-restricted goods. The list includes the specific forms of bauxite, coke, manganese, silicon carbide and zinc that have been identified by the complainants in Exhibit JE-6, but does not identify fluorspar as subject to export restriction: see *2010 Graded Export Licensing Entities Catalogue* (Exhibit CHN-343). The Panel explained in paragraph 7.763 above that it considers the essence of the *2010 Export Licensing Catalogue* Notice to be different from that of the *2009 Export Licensing Catalogue* Notice with respect to fluorspar and, as a result, does not consider that this Notice falls within its terms of reference.

materials listed in the *2009 Export Licensing Catalogue* are required to submit certain documents. All applicants must submit an application form[1266]; relevant "export quota or other applicable approval documents"[1267]; and either of the Form for Archival Filing and Registration of a Foreign Trade Operator which has been sealed by the archival filing and registration stamp, a Qualification Certificate of Import and Export Enterprises of the People's Republic of China, or a Certificate of Approval for Enterprises with Foreign Investment.[1268]

7.885 In addition, Under Article 11(1) of China's *Export Licence Administration Measures*, for the export of goods subject to the administration of quota licences, applicants must submit "quotagranting documents issued by the Ministry of Commerce or relevant department, and a valid export contract of the applicant. Under Article 11(2), for export goods subject to the administration of quota bidding, applicants must submit "the list of bid-winning Operators", "the bid-winning quantity"; either of the Certificate for the Application of an Export License of Goods subject to Quota Bidding, or the the export contract of the bid-winning Operator. Under Article 11(7), for goods subject to export licensing administration only, applicants are directed to submit "approval documents from the Ministry of Commerce" and a valid export contract.

1266. *2008 Export Licence Administration Measures*, Article 8 (Exhibits CHN-342, JE-74).

1267. *2008 Export Licence Administration Measures*, Article 9 (Exhibits CHN-342, JE-74).

1268. *2008 Export Licence Administration Measures*, Article 10 (Exhibits CHN-342, JE-74).

7.886 Article 5 of *2008 Export Licensing Working Rules*[1269], additionally provides that applicants to export goods subject to export licensing administration only shall submit an application form; "approval documents on export issued by the competent authorities"; a valid export contract; an agency agreement, where the exporter and the consignor are different; and "[o]ther materials that shall be submitted as stipulated by the Ministry of Commerce".

7.887 Enterprises that are subject to export quotas must first be allocated such quotas before they may apply for an export licence.[1270] Applicants that have been allocated such a quota must submit to the appropriate export licence issuing agency the relevant quota allocation certificate issued by the Bidding Committee or Bidding Office, in addition to the documents mentioned in paragraph 7.884 above.[1271]

7.888 In general, an export licence must be issued within three working days from the receipt of a completed application.[1272] China uses three types of export licences.[1273] First, there is the "one licence for one customs

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1269. Exhibits CHN-344, JE-97.

1270. *2008 Export Licence Administration Measures*, Article 21 (Exhibits CHN-342, JE-74).

1271. *2008 Export Licence Administration Measures*, Article 9 (Exhibits CHN-342, JE-74).

1272. *2008 Export Licence Administration Measures*, Article 19 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules*, Article 10 (Exhibits CHN-344, JE-97).

1273. *2008 Export Licence Administration Measures*, Article 22 (Exhibits CHN-342, JE-74).

house" export licence, which is used to export goods from a specific customs house. Second there is the "one batch, one license" export licence, which is used for customs declaration only once within their period of validity. Third, there is the "non-one batch, one license" export licence, which is used for customs declaration up to twelve times within their period of validity. Customs houses are required to indicate the respective quantity of outbound cargo on the customs release form when presented with an export licence. China issues "non-one batch, one license" types to foreign enterprises[1274] as well as for goods in the Catalogue for Goods Subject to the Administration of Export Licenses.[1275]

7.889 Article 8 of the *2008 Export Licensing Working Rules*[1276] instructs export licensing agencies to examine: (i) whether an operator has the "qualifications" to operate the business; (ii) whether the "export approval documents submitted by the operator are complete and valid"; (iii) whether the applicant has submitted a complete and accurate "application" that is "consistent with the relevant provisions of the administration of export goods and licenses, the contents of the export approval documents and the export contract"; and (iv) whether the "other materials that need to be submitted are consistent with relevant provisions". The export licensing agency is

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1274. *2009 Export Licensing Catalogue*, Article VII (Exhibit JE-22).

1275. *2008 Export Licence Administration Measures*, Article 22 (Exhibits CHN-342, JE-74).

1276. Exhibits CHN-344, JE-97.

directed to issue the corresponding export licences if it is satisfied that these conditions are met.[1277]

7.890 China has indicated that its *Foreign Trade Law* is a "legislative act that delegates (through the State Council) to MOFCOM, an executive branch agency, implementing authority, *inter alia* (1) to specify the products subject to export quota and export licensing requirements, and (2) to adopt implementing rules concerning the grant of export licenses".[1278] The Appellate Body confirmed that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[1279] In light of China's explanation, and in the absence of any assertion that the measures discussed above are not attributable to China, the Panel will consider these measures to be measures of China for purposes of its analysis.

2. Whether China's export licensing system on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with Article XI:1 of the GATT 1994

7.891 The complainants allege that China's export licensing system, as applied to bauxite, coke, fluorspar, manganese, silicon carbide and zinc under the *2009*

1277. *2008 Export Licensing Working Rules*, Article 9 (Exhibit CHN-344, JE-97).

1278. China's response to question No. 2 from the European Union, para. 279.

1279. Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81.

Export Licensing Catalogue, is both "non-automatic" and "discretionary" and, therefore, is inconsistent with GATT Article XI:1.

7.892 Article XI of the GATT 1994 provides:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.893 Thus, Article XI:1 forbids import and export restrictions or prohibitions, including those "made effective through ... export licences."

7.894 The Appellate Body has not yet been required to consider the meaning of "restrictions" in Article XI:1. Some panels, however, have done so. In *Colombia – Ports of Entry*, after reviewing several GATT and WTO cases, the panel concluded that "restrictions" in the sense contemplated by Article XI:1 refers to measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly.[1280] The panel in that dispute considered Article XI:1 in the context of measures that restricted access to ports of entry for goods being imported from Panama.

1280. Panel Report, *Colombia – Ports of Entry*, para. 7.240.

7.895 In the context of import licensing, the panel in *India – Quantitative Restrictions* concluded that the scope of the term "restriction" is "broad" and, in terms of its ordinary meaning, is "a limitation on action, a limiting condition or regulation."[1281] The panel thereafter concluded that "a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."[1282] The panel in *India – Autos* similarly endorsed a broad interpretation of the term "restriction", concluding that Article XI:1 applies to conditions that are "limiting' or have a "limiting effect ... on importation itself".[1283]

7.896 While these reports shed light on the meaning of "restriction", the Panel considers it useful to undertake a further review of Article XI:1 in order to assess its applicability to export licensing, including export licensing requirements that may be considered "non-automatic" or "discretionary". Although the panel in *India – Quantitative Restrictions* opined that a "discretionary or non-automatic import licensing requirement" is a restriction, the panel in *India – Quantitative Restrictions* did not distinguish between "non-automatic" and

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1281. Panel Report, *India – Quantitative Restrictions*, para. 5.128.

1282. Panel Report, *India – Quantitative Restrictions*, para. 5.129.

1283. Panel Report, *India – Autos*, para. 7.270. Several WTO panels have cited with approval this interpretation of the term "restrictions" in Article XI:1: see Panel Report, *Colombia – Ports of Entry*, paras. 7.233-7.234; Panel Report, *Brazil – Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.

"discretionary" licensing systems or explain potential differences in the meanings of these terms.[1284] That panel ultimately found that the particular licensing requirement at issue was a "discretionary import licensing system" where "licences are not granted in all cases, but rather on unspecified merits".[1285] The Panel does not find in the reasoning articulated by that panel a specific explanation of why "non-automatic" licensing systems are prohibited under Article XI:1 that would assist us here.

7.897 The Panel will first consider this general issue and thereafter will consider China's export licensing system in light of its determination on the scope of GATT Article XI:1.

(a) "Non-automatic" or "discretionary" export licensing under Article XI:1 of the GATT 1994

7.898 The complainants submit that Article XI:1 prohibits "non-automatic" export licensing requirements. In other words, the complainants contend that export licensing requirements that accord licensing authorities "discretionary" authority in determining whether to grant an export licence to a particular applicant are prohibited under Article XI:1.

7.899 The United States and Mexico point out that Article XI:1 expressly identifies export licences as a type

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1284. Panel Report, *India – Quantitative Restrictions*, para. 5.129, 5.137.

1285. Panel Report, *India – Quantitative Restrictions*, para. 5.130.

of measure that can restrict exportation.[1286] The United States adds as well that Article XI:1 "qualifies its ban on restrictions" by explicitly *excluding* from its scope duties, taxes or other charges. According to the United States, this demonstrates that the restrictions that fall *within* the scope of Article XI:1 include other types of restrictions imposed on exportation. It notes further that GATT and WTO panels have interpreted Article XI:1 to cover restrictions other than just "quantitative" restrictions.[1287] The United States and Mexico submit, in particular, that the panel in *India – Quantitative Restrictions* concluded that a "discretionary or non-automatic import licensing requirement" is a "restriction" that is prohibited by Article XI:1.[1288]

7.900 The European Union submits that "[i]t is generally accepted that an import or export licensing requirement falls within the scope of Article XI when it is 'discretionary or non-automatic'".[1289] It argues that Article XI:1 has been found broadly to protect trading and competitive opportunities for both Members

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1286. United States' first written submission, paras. 332-333; Mexico's first written submission, paras. 334-335.

1287. United States' opening oral statement at the second substantive meeting, para. 124.

1288. United States' first written submission, paras 341; Mexico's first written submission, paras 344, referring to Panel Report, *India – Quantitative Restrictions*, para. 5.129.

1289. European Union's first written submission, para. 316.

and traders.[1290] The European Union contends that a discretionary export licensing system "by its very nature limits such opportunities because certain exports may not be permitted".[1291]

7.901 China submits that Article XI:1 should not be construed broadly to prohibit all forms of export licensing. China argues that Article XI:1 does not prohibit Members from imposing any and all regulatory conditions on exportation; rather it prohibits the imposition of certain conditions, namely those that have a "limiting effect" on the quantity of exports.[1292] China submits that a complainant must prove that although a measure such as a licensing requirement does not contain any express restriction on exportation, it functions to restrict exports.[1293]

7.902 China submits that not all types of licences have a "limiting effect" on the quantity of imports or exports and therefore not all licences are inconsistent with Article XI:1. For instance, China contends that a licence that is issued "automatically" has no limiting effect and is therefore permissible.[1294] Relying on the ordinary meaning of "automatic" and the definition of "automatic" licensing in the Import Licensing Agreement, China

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1290. European Union's second written submission, paras. 90 and 103.

1291. European Union's second written submission, para. 90.

1292. China's first written submission, paras. 748-752; China's second written submission, paras. 482-484.

1293. China's first written submission, para. 752.

1294. China's first written submission, para. 753.

submits that licensing is "automatic" and consequently should not be prohibited if the export licence is issued in all cases, where preestablished conditions are met.[1295]

7.903 According to China, Article 1.1 of the Import Licensing Agreement confirms that the mere requirement to submit a valid and complete application or other documentation as a condition to receive a licence is not sufficient to render a licensing requirement a restriction on the quantity of exports and hence inconsistent with Article XI:1.[1296]

7.904 China submits that criteria set out in Article 2 of the Import Licensing Agreement support the view that licensing may be "automatic" and thus permissible. According to China, automatic licensing in this context includes situations where a licensing agency has no right to refuse issuance of an export licence, upon submission of enumerated application documents; when licences are issued "regularly" upon receipt of the relevant and completed application; when a licence application procedure is "accessible"; and when the time taken for issuance is not too long.[1297]

7.905 China argues that even when a licence may not be considered "automatic" based on these factors, a licence should nevertheless not be presumed to restrict

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1295. China's first written submission, paras. 754, 755.

1296. China's first written submission, paras. 758-759; China's second written submission, paras. 488-489.

1297. China's first written submission, paras. 754, 756 referring to Import Licensing Agreement, Article 2.2(a).

the quantity of exports *per se* in a way that would violate Article XI:1. In this respect, China submits that Article 3.2 of the Import Licensing Agreement clarifies that licences that are not "automatic" within the meaning of Article 2 of the Import Licensing Agreement should not be prohibited, so long as they are not more "trade-restrictive" or "trade-distortive", or "burdensome" than necessary to administer the measure. These licences would be considered "non-automatic" but are nevertheless WTO-permissible, in its view. According to China, if a non-automatic licence does not "limit the quantity of imports or exports", it is not WTO-inconsistent.[1298]

7.906 More broadly, China argues that where a measure does not expressly or necessarily provide for WTO-inconsistent conduct, the discretion to apply the rule in a WTO-inconsistent manner is insufficient to render the measure WTO-inconsistent. China argues that it should be presumed to act in good faith with its obligations.[1299] Thus, China argues, the absence of any explicit limitation on this discretion does not render an export licence non-automatic in such a way as to have a limiting effect on the quantity of exports.

(i) Import and export licensing under Article XI:1 of the GATT 1994

7.907 The Panel recalls, as set out above, that Article XI:1 of the GATT 1994 forbids "import and export restrictions or prohibitions made effective through ... export licences". Duties, taxes or other charges are explicitly excluded as

1298. China's second written submission, para. 487.

1299. China's first written submission, paras. 803-804.

types of "restrictions or "prohibitions" that fall within the scope of Article XI:1.

7.908 It is useful to bear in mind that import or export prohibitions or restrictions may be permitted or justified under other provisions, such as Articles XI:2, XII, XVIII, XIX, XX and XXI of the GATT 1994. Restrictions permitted under these provisions may be implemented through, e.g., a licensing regime. Article XIII of the GATT 1994 sets out rules for the administration of such restrictions. In the context of import licensing, the Import Licensing Agreement clarifies rules for import licensing procedures.

7.909 China, as well as the Kingdom of Saudi Arabia[1300], as a Third Party, submit that the Import Licensing Agreement provides useful context to inform which licensing requirements may be permitted under Article XI:1.[1301] In China's view, the Import Licensing Agreement makes clear that licensing is permissible, regardless of a label assigned to it, "if the export license is issued in all cases, provided pre-established conditions are met".[1302] Even if a licence falls into the residual category of "non-automatic" licensing set out in Article 3.2 of the Import Licensing Agreement, according to China, that license procedure is not WTO-inconsistent, so long as it does not "limit the quantity of imports or exports".[1303]

1300. Third party written submission of Kingdom of Saudi Arabia, paras. 17-27.

1301. See, e.g., China's response to Panel question No. 66 following the second substantive meeting, para. 337, fn. 392.

1302. China's first written submission, para. 754.

1303. China's second written submission, para. 487.

7.910 Saudi Arabia does not consider an export licensing system to be "automatic" where its application requirements include or enforce export conditions, such as an export quota.[1304] Nevertheless, it agrees with China that the presence of an application process does not necessarily render an export licensing system "non-automatic" or *per se* WTO-inconsistent.

7.911 We agree with China and Saudi Arabia that the Import Licensing Agreement informs the meaning of the terms "automatic" and "non-automatic" (as a residual category of "automatic" licenses) in the context of import licensing systems. However, that Agreement does not address *export* licensing systems. Nor for that matter does it set out in precise terms which *import* licences would be WTO-inconsistent, although it does provide that import licences should be in conformity with all "relevant" provisions of the GATT 1994 "as interpreted by [the Import Licensing Agreement]".[1305] Hence, the Panel considers that the Import Licensing Agreement itself provides only limited assistance in the task of interpreting Article XI:1.

1304. Third party written submission of Kingdom of Saudi Arabia, para. 18.

1305. Article 1.2 of the Import Licensing Agreement provides: "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures".

7.912 The Appellate Body has indicated that the title of a provision may be useful in defining its objective.[1306] The Panel notes the title of Article XI:1 – "General Elimination of Quantitative Restrictions" suggests that the provision is intended to govern elimination of quantitative restrictions generally. While relevant, the Panel's interpretative task does not of course end with the title. To determine the scope and meaning of Article XI:1, the Panel needs to consider the particular terms of the provision.

7.913 Article XI:1 by its terms prohibits restrictions or prohibitions that are made effective through a variety of means not solely through a category of measures that may be considered formal quantitative restrictions, such as a quota. Article XI:1 also prohibits restrictions effected through export licenses, as well as an unqualified category of "other measures". In the Panel's view, the fact that the title uses the term "quantitative restrictions" does not change the fact that a broad category of "other measures" falls within the scope of Article XI:1.

7.914 The Panel's view is consistent with findings of other GATT and WTO panels that types of measures "other" than quotas, import or export licences, duties, taxes or charges that have a "limiting effect" or impose a "limiting condition" are prohibited under Article XI:1.[1307] Panels have assessed such measures by examining their design and structure to determine whether they have a "limiting" or "restrictive" effect.[1308]

1306. Appellate Body Report, *US – Softwood Lumber IV*, para. 93; Appellate Body Report, *US – Carbon Steel*, para. 67.

1307. See, e.g., discussion in paragraphs 7.205-7.206 above.

1308. Panel Report, *India – Autos*, paras. 7.266-7.268; Panel Report, *Colombia – Ports of Entry*, para. 7.252.

7.915 The Panel will adopt a similar analytical approach. The Panel sees no merit in seeking to determine whether or not a measure is permissible under Article XI:1 based solely on its label. In other words, the Panel does not find useful for its analysis here whether a measure is categorized as an "automatic" or "non-automatic" licence. Indeed, the obligation set forth in Article XI:1 does not distinguish between types of import or export licences that would be prohibited, be they automatic, non-automatic or discretionary. Rather, it concerns "prohibitions or restrictions" including those "made effective through ... import or export licenses". Hence, our analysis will examine the design and structure of the licence to determine if it has a "limiting" or "restrictive" effect.

7.916 Setting aside the use of a particular label or nomenclature for a licence, the Panel considers that a licensing system that operates such that a licence to import or export is granted upon application to each and every applicant would not run afoul of Article XI:1. This is because such a system does not imply any restriction or limiting effect on importation or exportation in connection with the application and granting of the licence. An example of such a system is one that is designed to gather statistical information or for monitoring purposes, but presents no impediment to obtaining the licence as it is granted in every case.

7.917 The Panel also considers that requiring an applicant to satisfy a certain prerequisite before being granted an import or export licence would not necessarily offend Article XI:1. The requirement to satisfy a prerequisite would be prohibited under Article XI:1 only if the

prerequisite itself created a restriction or limiting effect on importation or exportation. For example, if a licensing system is maintained in order to administer an import quota that is authorized under the GATT 1994, requiring the applicant to submit a particular document attesting to an applicant's right to import quota in order to receive the licence is unlikely to constitute a violation of Article XI:1. This is because the requirement to submit the document does not effect any restriction or impose a limiting effect on importation; the restriction on importation is the quota itself. A different conclusion could obtain, however, if the prerequisite were of a different nature.

7.918 Therefore, the Panel concludes that import and export licences, including those granted only upon meeting a certain prerequisite, may be, but are not necessarily, permissible under Article XI:1; the key is whether the licensing system is designed and operates such that by its nature it does not have a restrictive or limiting effect on importation or exportation. If it meets this test, it will not offend Article XI:1 of the GATT 1994.

(ii) Discretionary licensing requirements

7.919 Before turning to examine China's export licensing system, we should address discretionary licensing requirements.

7.920 As noted above, the panel in *India – Quantitative Restrictions* found that the particular licensing requirement at issue was a "discretionary import licensing system" where "licences are not granted in all cases, but rather on unspecified merits", and was therefore WTO-

inconsistent.[1309] The panel in *Turkey – Rice* considered that whether a licensing practice is "discretionary" depends on the freedom of the administering authority to grant or reject an import licence.[1310] The panel in *China – Publications and Audiovisual Products* similarly found that a measure was "discretionary" because the implementing authority had "the freedom to choose, based essentially on its own preference, whether or not such rights are granted".[1311]

7.921 It seems to the Panel that if a licensing system is designed such that a licensing agency has discretion to grant or deny a licence based on unspecified criteria, this would not meet the test we set out above in order to be permissible under Article XI:1. The possibility to deny the licence would be ever present; hence, the system by its very nature would always have a restrictive or limiting effect. It makes no difference, in the Panel's view, that discretion may be applied in a particular case such that a licence is authorized. The system offers no certainty that licences will be granted and hence it is not permissible.

7.922 With this in mind, the Panel will next consider whether China's export licensing system for the forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc at issue is inconsistent with Article XI:1. In doing so, the Panel recalls China's argument that, where a measure

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1309. Panel Report, *India – Quantitative Restrictions*, para. 5.130.

1310. Panel Report, *Turkey – Rice*, paras. 7.128, 7.134.

1311. Panel Report, *China – Publications and Audiovisual Products*, para. 7.324.

does not expressly provide for WTO-inconsistent conduct, the discretion to apply the rule in a WTO-inconsistent manner is insufficient to render the measure WTO-inconsistent.[1312] The Panel explained above that it will examine the design and structure of the measure at issue it making its assessment.

(b) China's export licensing system for the forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc

7.923 The complainants allege that China's export licensing system, as applied to the forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc under the *2009 Export Licensing Catalogue*, is inconsistent with Article XI:1 because it is "non-automatic" and because it provides China's export licensing agencies with discretion to restrict exportation of these materials.

7.924 The complainants argue that Article 19 of China's *Foreign Trade Law* imposes a "nonautomatic" licence requirement for specified goods that are "subject to export restriction". They distinguish this alleged "non-automatic" requirement from an "automatic" licence requirement that is implemented for "freely exported goods" under Article 15 of China's *Foreign Trade Law* for "monitoring purposes".

7.925 The United States and Mexico submit that regulation of export licences under the provisions of Article 19 is "non-automatic" by its nature.[1313] They argue

1312. China's first written submission, paras. 803-804.

1313. United States' first written submission, paras. 338-

that licensing agencies may exercise discretion and impose conditions on the granting of licences to set the quantities of goods that can be exported. Conditions include requiring "undefined 'documents of approval' and 'other materials to be submitted' as bases for issuance of export licenses".[1314] The United States and Mexico submit that China has itself conceded that its export licensing system amounts to an export restriction under GATT Article XI:1 through its notification to the WTO Committee on Market Access in 2006 and 2007 that its licence requirements are a "quantitative restriction" justified pursuant to Article XI and XX of the GATT 1994.[1315]

7.92 The European Union argues that a logical interpretation of Articles 15 and 19 of China's *Foreign Trade Law* leads to the conclusion that export licences imposed on goods subject to restriction under Article 19 are not "automatic" by operation of law.[1316] The European Union cites references in the *Regulation*

339, 342.

1314. United States' first written submission, para. 340, fn. 415; Mexico's first written submission, para. 343, fn. 415.

1315. United States' second written submission, para. 378 and Mexico's second written submission, para. 383, referring to Committee on Market Access, Note by the Secretariat: Notifications of Quantitative Restrictions G/MA/NTM/QR/1Add.11 (11 April 2008) (Exhibit JE-171); *Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final)* (Exhibit JE-172)).

1316. European Union's opening oral statement at the first substantive meeting, para. 9.

on Import and Export Administration[1317] to goods "prohibited from exportation" and goods "limited in exportation"[1318], including those goods that are "subject to the administration of licenses".[1319] It submits that these goods are subject to non-automatic export licenses.[1320] The European Union contends that Articles 16, 17 and 18 of China's *Foreign Trade Law*, which set out conditions that must be met and procedures that must be followed in order for a good to be declared as "restricted or forbidden from export", confirm that China mandates its authorities to treat Article 19 export licences as non-automatic.[1321]

7.927 The European Union also argues that the non-automatic nature of the licences is made clear from the text of Notices that China publishes annually announcing the "list of goods that are submitted to export license management".[1322] In respect of goods subject to export licensing administration only, the European Union additionally contends that China's export licensing system is inconsistent with Article XI:1 because it "allows China's authorities a very broad and unfettered

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1317. *Regulation on Import and Export Administration* (Exhibit CHN-152, Exhibit JE-73).

1318. *Regulation on Import and Export Administration*, Articles 33 and 35 (Exhibit CHN-152, Exhibit JE-73).

1319. *Regulation on Import and Export Administration*, Article 43 (Exhibit CHN-152, Exhibit JE-73).

1320. European Union's first written submission, para. 317.

1321. European Union's second written submission, para. 64.

1322. European Union's first written submission, para. 317, referring to Notice 100/2008 (Exhibit JE-22).

discretion on whether to grant or refuse export licenses to applicants".[1323] Specifically, the European Union argues that China's export licence agencies may require, under Article 5(5) of China's *2008 Export Licensing Working Rules*, undefined "other documents" prescribed by the Ministry of Commerce for some applicants but not others, or to require documents during certain times but not others.[1324] The European Union argues that there is no proof of limitation of discretion to require documents. If there were no discretion, it argues, the export licence would always be issued for the entire quantity requested based on the export contract. In addition, the European Union submits that China's export licensing agencies, under Article 11(7) of China's *2008 Export Licence Administration Measures*, have discretion to require undefined "documents of approval of the Ministry of Commerce".[1325] The European Union argues that the discretion inherent in these criteria allows China's export licence authorities to restrict, or altogether ban, exportation by certain companies or individuals.[1326]

1323. European Union's first written submission, para. 319.

1324. European Union's first written submission, para. 319; European Union's second written submission, para. 69, referring to *2008 Export Licensing Working Rules*, Article 5.5 (Exhibits CHN-344, JE-97). China submits that the correct interpretation is "other materials that shall be submitted as stipulated by the Ministry of Commerce." China's second written submission, para. 509.

1325. European Union's first written submission, para. 321; *Measures for Administration of Licensing Entities*, Article 11.7 (Exhibits CHN-358, JE-75).

1326. European Union's first written submission, paras. 319, 321; European Union's second written submission, para. 98.

7.928 China disputes the complainants' claims that its export licence regime is inconsistent with GATT Article XI:1 due to references to the term "restriction" in provisions of its law. It considers that the label applied to its export licence system does not determine a violation of Article XI:1.[1327] China similarly rejects that export licence issuing agencies enjoy discretion in granting an export licence, including discretion to determine the quantity that an applicant may export.[1328] China submits that requiring documentation as a condition for receipt of a licence does not convert an otherwise valid licence requirement into a prohibited restriction on the quantity of exports.[1329]

7.929 Under applicable Chinese law, China contends that export licences for bauxite, coke, manganese, silicon carbide and zinc are automatically granted in all cases, and within three days, provided that a valid and complete set of documents is submitted with the application.[1330] In two official statements issued by the Quota & License Administrative Bureau of MOFCOM, dated 20 July 2010 and 11 November 2010 respectively (Exhibit CHN-345 and Exhibit CHN-529), China specifies which documents are required to receive an export licence in the case of: (i) goods subject to quotas directly allocated, (ii)

1327. China's first written submission, para. 762, referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87, fn. 87; China's second written submission, para. 497.

1328. China's first written submission, para. 798.

1329. China's first written submission, paras. 758-759, 800.

1330. China's first written submission, paras. 771, 776; China's second written submission, para. 499.

goods subject to quota bidding, and (iii) manganese and unwrought zinc, which are not subject to quotas but are subject to export licensing requirements.[1331] China argues that full details on the required documents and steps to acquire a licence appear in Articles 8 to 10 of its *2008 Export Licence Administration Measures*[1332], and Article 9 of the *2008 Export Licensing Working Rules*.[1333] China submits that the *2008 Export Licensing Working Rules*

1331. China's first written submission, paras. 773-774. For goods subject to quota licence administration, China submits that an applicant must submit: (a) an application form; (b) the Form for Archival Filing and Registration of a Foreign Trade Operator or the Qualification Certificate of Import and Export Enterprises or the Certificate of Approval for Foreign-Invested Enterprises; (c) the "quota-granting documents issued by relevant authorities"; and (d) the export contract. For goods subject to quota bidding, China submits that an applicant must submit: (a) an application form; (b) the Form for Archival Filing and Registration of a Foreign Trade Operator or the Qualification Certificate of Import and Export Enterprises or the Certificate of Approval for Foreign-Invested Enterprises; (c) the list of bid-winning operators and the bid-winning quantity announced; (d) the Certificate for the Application of an Export License of Goods subject to Quota Bidding or the Certificate for Transfer of Goods Subject to Quota Bidding; and (e) the export contract of the bid-winning operator. China submits that applicants wishing to export manganese and unwrought zinc must submit: (a) an application form; (b) Form for Archival Filing and Registration of a Foreign Trade Operator or the Qualification Certificate of Import and Export Enterprises or the Certificate of Approval for Foreign-Invested Enterprises; and (c) an export contract. China argues this is confirmed under the *2010 Export Licensing Catalogue*.

1332. China's first written submission, para. 775.

1333. China's first written submission, para. 777.

do not implement the *Measures for the Administration for the Export of Goods*; instead, they are an "internal guide for the personnel of the licence-issuing authorities on the applicable rules governing the issuance of export licences".[1334]

7.930 Article 11(7) of the *Measures for the Administration of Licenses for the Export of Goods* applies to goods that are not subject to quotas but are subject to export licensing requirements. For submits that the *2010 Export Licensing Catalogue* includes a notation in its Appendix 1 that export licences for these products will be "applied for and granted" upon presentation of an export contract in the 2010 *Catalogue*. China argues that, as a matter of Chinese law, this constitutes an "approval" by MOFCOM within the meaning of Article 11.7.[1335] Finally, China submits that the European Union has not provided any examples in which an applicant was required to provide documents other than those specified in the *2008 Export Licence Administration Measures*. Accordingly, it requests the Panel to reject the European Union's claim on these aspects.[1336]

1334. China's opening oral statement at the second substantive meeting, para. 355; see also China's response to Panel question Nos. 22 and 23 following the first substantive meeting paras 113-117.

1335. China's first written submission, para. 822, footnote 1166. See also China's first written submission, para. 817, footnote 1160, para. 773, footnote 1106 and para. 796, footnote 1138, China's response to question No. 2 from the European Union following the first substantive meeting, para. 285; China's second written submission, para. 544, footnotes 734 and 737.

1336. In its opening oral statement at the second substantive meeting (paras. 362 and 363), China submits that the European

7.931 In respect of goods subject to export licensing administration only, the European Union submits that the Panel may wish to accept in good faith official statements issued in 2010 by the Quota & License Administrative Bureau of MOFCOM (Exhibit CHN-345 and Exhibit CHN-529) that export licensing agencies do not exercise discretion to grant export licences.[1337] It accepts that the Panel may incorporate these statements in its final Reports to the DSB and attribute legal importance to them to achieve a positive solution to the dispute.[1338] If it were to do so, the European Union requests the Panel to state the consequence were China to repudiate these statements.[1339] The European Union cautions as well that the Panel cannot accept such a statement where it would amount to "an administrative promise to disregard the defending Member's own binding internal legislation, i.e., by an administrative undertaking to act illegally".[1340]

Union additionally claims that China's power to amend the list of documents required to support an application is inconsistent with GATT Article XI:1. The European Union indicated it was not making such a claim in response to Panel question No. 62 following the second substantive meeting paras. 85-86. Accordingly, the Panel does not consider further this argument by China.

1337. European Union's second written submission, para. 55; European Union's opening oral statement at the first substantive meeting, para. 6.

1338. European Union's opening oral statement at the first substantive meeting, para. 6; European Union's second written submission, para. 73.

1339. European Union's second written submission, para. 73.

1340. Panel Report, *US – Section 301 Trade Act*, para. 7.103.

7.932 The European Union, however, disputes that Article 11 of the *2008 Export Licence Administration Measures* determines the relevant documents, thereby removing all discretion. The European Union submits that Article 5 of the *2008 Working Rules on Export Licenses*, as implementing measures of the *2008 Export Licence Administration Measures*, refers to documents that are not mentioned in the *2008 Export Licence Administration Measures*.[1341] It submits that the *2008 Export Licensing Working Rules* include undefined terms.[1342] The European Union also notes that Article 9 of the *2008 Export Licensing Working Rules* comes into play only after the authorities have concluded that the "applications conform to the regulations".[1343]

7.933 Finally, the European Union disputes the relevance of the note in the appendix of the *2010 Export Licensing Catalogue* and related official statement dated 11 November 2010 (Exhibit CHN-529), which specifies that export licences are to be issued on the basis of export contracts alone for goods not subject to an export quota, notably manganese and unwrought zinc. The European Union submits that the *2010 Export Licensing Catalogue* leaves MOFCOM with discretion to issue documents of approval limiting the quantities of manganese and unwrought zinc that may be exported. In addition, it argues that future versions of the annual Catalogue of Goods Subject to Export Licensing Administration may

1341. European Union's second written submission, para. 76.

1342. European Union's second written submission, para. 75.

1343. European Union's second written submission, para. 85.

not permit the granting of a licence on the basis of export contracts alone.[1344] Absent modification or repeal of the Export Licensing Measures, the European Union argues that China has not removed the discretion enjoyed under this provision.[1345]

7.934 The Panel first recalls its conclusion in paragraph 7.918 above that export licences are not *per se* inconsistent with GATT Article XI:1. In particular, the Panel found that licensing conditions may be imposed in licensing systems that are themselves justified pursuant to a provision of the WTO Agreement, such as GATT Articles XI:2, XII, XVIII, XIX, XX and XXI provided they do not by their nature have a restrictive or limiting effect.

7.935 Under the provisions in China's law identified by the complainants, certain goods are subject to export restriction (under Article 19 of *China's Foreign Trade Law*), while other goods are not (under Article 15 of *China's Foreign Trade Law*). In the Panel's view, the fact that goods subject to export restriction are in turn subject to a licensing requirement is not sufficient to establish that such a requirement is impermissible under GATT Article XI:1. As stated, prerequisites may be imposed in licensing systems that implement a permitted restriction. Hence, the inquiry as to whether or not a licence requirement is or is not permissible under Article XI:1 does not end at the text of the measure imposing the licensing requirement. It is necessary to determine if there is a restrictive or limiting effect.

1344. European Union's second written submission, para. 93.

1345. European Union's second written submission, para. 95.

7.936 It is possible that license requirements for certain goods eligible for export under Article 19 of *China's Foreign Trade Law* may in fact be justified. There is also no evidence before us indicating that the measures must necessarily be applied in such a way as to impose any restriction additional to that arising from the underlying restriction. As explained in paragraph 7.917 above, in the Panel's view, the mere requirement to submit an application or documentation as a condition to obtain a licence to export does not on its own necessarily rise to the level of a restriction under Article XI:1.

7.937 Articles 16, 17 and 18 of *China's Foreign Trade Law* do not on their face indicate that a particular licence requirement is to be imposed in such a way as to impose any additional limiting or restrictive effect. Articles 16 and 17 set out reasons for which China may restrict or ban the export of particular goods, including for numerous reasons similar to those set out in GATT Articles XX and XXI. The measures do not indicate on their face, and the complainants have not submitted any evidence to prove, that export licensing applied in conformity with the rationale in Articles 16 and 17 of *China's Foreign Trade Law* imposes additional restrictions to that which may arise from the underlying measure.

7.938 Accordingly, for the reasons set out above, the Panel does not agree with the complainants that China's export licensing requirement imposed on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with Article XI:1 simply because a licence requirement is applied to "goods subject to ... export restrictions". In the Panel's view, GATT Article XI:1 does not support such a conclusion.

7.939 The Panel will next address the additional claim that China's export licensing requirement is inconsistent with Article XI:1 because China's export licensing agencies exercise discretion in deciding whether to grant export licences to applicants to export bauxite, coke, fluorspar, manganese, silicon carbide and zinc.

7.940 The Panel explained in paragraph 7.919 above that an additional restriction sufficient to violate Article XI:1 could arise where a licensing agency exercises discretion in its decision to grant an export licence.

7.941 The arguments of the parties turn on whether there is a exhaustive list of the particular documents that are required to receive an export licence. As discussed in paragraph 7.929 above, China submits that there is an all-inclusive definitive list of materials that must be submitted, in the case of goods subject to quota licence administration, goods subject to quota bidding, and lastly, those goods subject to an export licensing requirement only, namely the forms of manganese and unwrought zinc at issue in this dispute. China contends that for goods subject to quota licence administration, an applicant must submit: (i) an application form; (ii) a form demonstrating that the applicant is registered and authorized to export[1346]; (iii) evidence that the applicant is one of the enterprises granted a quota share; and (iv) an export contract.

1346. To satisfy this requirement, an applicant must submit either the Form for Archival Filing and Registration of a Foreign Trade Operator; the Qualification Certificate of Import and Export Enterprises; or the Certificate of Approval for Foreign-Invested Enterprises.

7.942 For goods subject to quota bidding, an applicant must submit: (i) an application form; (ii) a form demonstrating that the applicant is registered and authorized to export[1347]; (iii) evidence that the applicant is one of the export quota bid winners; (iv) a Certificate for the Application of an Export License of Goods subject to Quota Bidding or a Certificate for Transfer of Goods Subject to Quota Bidding; and (v) an export contract of the bid-winning operator.

7.943 In respect of manganese and unwrought zinc that are subject to export licensing administration only, under the *2010 Export Licensing Catalogue*, applicants seeking to export must submit: (i) an application form; (ii) a form demonstrating that the applicant is registered and authorized to export[1348]; and (iii) an export contract. Appendix 1 of the *2010 Export Licensing Catalogue* indicates that an applicant is only required to present an export contract to obtain an export licence.[1349] Effectively, as clarified in statements by the Quota &

1347. To satisfy this requirement, an applicant must submit either the Form for Archival Filing and Registration of a Foreign Trade Operator; the Qualification Certificate of Import and Export Enterprises; or the Certificate of Approval for Foreign-Invested Enterprises.

1348. To satisfy this requirement, an applicant must submit either the Form for Archival Filing and Registration of a Foreign Trade Operator; the Qualification Certificate of Import and Export Enterprises; or the Certificate of Approval for Foreign-Invested Enterprises.

1349. China's first written submission, para. 796, fn 1138.

License Administrative Bureau of MOFCOM[1350], China has suspended the requirement for an applicant to submit any other documents of approval in 2010 in order to obtain a licence to export either manganese or unwrought zinc.

7.944 The Panel does not question China's position as confirmed in statements by the Quota & License Administrative Bureau of MOFCOM (Exhibits CHN-345 and CHN-529) that China does not require materials in addition to these enumerated documents. However, the Panel observes that Article 11(7) of *2008 Export Licence Administration Measures* and Article 5(2) and 8(2) of *China's Working Rules on Export Licenses* also refer to a requirement to submit undefined "other documents of approval". In addition, Articles 5(5) and 8(4) of *China's Working Rules on Export Licenses* refer to undefined "other materials" as required by the Ministry of Commerce.

7.945 The Panel accepts that the reference to "other documents of approval" in Article 9, and "documents of approval for export" in Article 12 of China's *2008 Export Licence Administration Measures* refer to the documents enumerated in the subparagraphs of Article 11 of the *2008 Export Licence Administration Measures*. Further, the Panel understands the reference to "documents of approval" in Articles 5(2) and 8(2) of China's Working Rules on Export Licenses to refer to these same documents.

7.946 However, the Panel does not understand the reference to "documents of approval" in Article 11(7) of the *2008 Export Licence Administration Measures*, as

1350. Exhibit CHN-345 and Exhibit CHN-529.

applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules*, applicable generally, to refer to any enumerated documents. As argued by the complainants, this unspecific language leaves open the possibility of expanding or modifying the documents or materials that may be required to receive an export licence. Thus, it is unclear whether additional documents will be required from a particular applicant in order to satisfy the requirement to submit a complete and accurate application in accordance with Article 12 of China's *2008 Export Licence Administration Measures*, or Article 10 of China's *Working Rules on Export Licenses*. In the Panel's view, these undefined requirements operate so as to leave Chinese License Authorities with open-ended discretion to restrict or prohibit the exportation of the subject raw materials.[1351]

7.947 China considers that, where a measure does not expressly or necessarily provide for WTOinconsistent conduct, any discretion to apply the rule in a WTO-inconsistent manner is insufficient to render the measure

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1351. The Panel foresees the possibility that other evidence or documents may be desirable or necessary, in certain circumstances, to approve the authorization of an enterprise to export. For instance, Article 11(5) of China's *2008 Export Licence Administration Measures* provides that the exportation of chemicals under supervision and control requires an applicant to submit documents of approval to the Office of State Leading Group for the Performance of the Convention on Prohibition of Chemical Weapons. However, this would be a specific requirement and thus different from an undefined requirement.

WTO-inconsistent.[1352] In view of that, China argues that the absence of any explicit limitation on this discretion in these measures does not render an export licence a licence that restricts exportation and thus prohibited under Article XI:1.

7.948 In the Panel's view, in the context of a licensing requirement, the open-ended discretion created by the unspecific and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7), as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's *2008 Export Licensing Working Rules*, creates uncertainty as to an applicant's ability to obtain an export licence. The authority to deny the licence is ever present because the conditions for granting it are subject to the demands of the particular licensing authority. This uncertainty amounts to a restriction on exportation that is inconsistent with Article XI:1.

7.949 The Panel reaches these conclusions in light of the measures in its terms of reference, including the *2009 Export Licensing Catalogue*. In respect of goods subject to export licensing only, China submits that Appendix 1 of the *2010 Export Licensing Catalogue* removes any uncertainty by suspending the requirement for an applicant to submit any other documents of approval in 2010 in order to obtain a licence.

7.950 Setting aside the issue of whether the *2010 Catalogue* falls within the Panel's mandate, the Panel observes that the reference in Appendix 1 of the *2010*

1352. China's first written submission, paras. 803-804.

Catalogue does not modify or remove the documentation requirements in Article 11(7) of China's *2008 Export Licence Administration Measures* or in China's *2008 Export Licensing Working Rules*. Absent modification or repeal of *2008 Export Licence Administration Measures*, the Panel considers that Appendix 1 of the *2010 Catalogue* does not remove the inconsistency of the problematic measures as pertains to manganese and unwrought zinc that are subject to export licensing administration only.

7.951 The Panel lastly considers arguments of the United States and Mexico that China's export licensing regime for the raw materials at issue is inconsistent with Article XI:1 because it allows agencies discretion to determine the quantities that can be exported[1353]; impose minimum price conditions[1354]; or reduce quotas, stop issuing licences, or withdraw export rights under Article 21 of the *CCCMC Coordination Measures*.[1355]

1353. United States' first written submission, para. 340; Mexico's first written submission, para. 342; see 2008 *Export Licence Administration Measures*, Article 6 (Exhibits CHN-342, JE-74); *Export Quota Measures*, Article 25 (Exhibit JE-76).

1354. United States' first written submission, para. 340; United States' second written submission, para. 377, Mexico's first written submission, para. 342; Mexico's second written submission, para. 382; see *Measures for the Administration of Licensing Entities*, Article 40(3) (Exhibits CHN-358, JE-75), *Bauxite Branch Coordination Measures*, Article 7 (Exhibit JE-108).

1355. United States' second written submission, para. 377; Mexico's second written submission, para. 382; see *CCCMC Coordination Measures*, Article 21 (Exhibit JE-107).

7.952 The measures identified by the complainants do not expressly state that licensing agencies may determine the quantities that can be exported. The Panel concluded above that China's export licensing requirement is not inconsistent with Article XI:1 simply because a licence requirement is imposed with respect to "goods subject to ... export restrictions", in particular under Article 19 of China's *Foreign Trade Law*. The Panel explained that quantitative restrictions may be permitted on certain occasions, and accordingly, Article 19 was not on its face inconsistent with GATT Article XI:1. The Panel also concluded that certain provisions at issue allow export licensing agencies a degree of discretion that may sometimes lead to a decision not to grant an export licence. For these reasons, the Panel does not consider it necessary to address the United States' and Mexico's concern further.

7.953 The United States and Mexico additionally refer to Article 40(3) of China's *Measures for the Administration of Licensing Entities*, which sets out the punishment that may be imposed on export licensing agencies that issue licences without following coordinated export prices. The complainants have also identified this provision, and the use of penalties and punishment as prescribed in other provisions of Chinese law, in respect of their claim that China imposes a minimum export price requirement that is inconsistent with GATT Article XI:1. The Panel considers this provision relates to the alleged restrictive effect of a minimum export price requirement. The Panel will thus address the WTO-consistency of these aspects in Section VII.G of these Reports.

7.954 Finally, Article 21 of the *CCCMC Export Coordination Measures* provides: "if more than half of the voting member companies of the coordination organization agree, CCCMC can request the competent authority to reduce [non-compliant companies'] quotas or stop issuing licences for the commodities or even withdraw part or all of their export rights". China claims that this provision does not grant the CCCMC the authority to impose conditions on the issuance of licences, but provides "an internal framework for the CCCMC membership to vote on whether to request MOFCOM to take action to sanction non-compliant firms".[1356]

7.955 The Panel concluded above that licences may be used to implement an underlying restriction that is justified pursuant to another provision of the WTO Agreement; however, such a licence may not be applied in a manner that would impose an additional limiting or restrictive effect. In addition, the Panel explained that the discretion granted to export licensing agencies to refuse to grant an export licence may amount to an additional restriction that is inconsistent with GATT Article XI:1 if the refusal to grant such a licence does not relate to the underlying measure that is implemented through the licensing requirement.

7.956 On its face, Article 21 of the *CCCMC Coordination Measures* allows the CCCMC to request a licensing agency to refuse issuance of licences solely on the basis that more than half of the voting member companies of the coordination organization request such action. The Panel recalls from its 1 October 2010 preliminary ruling

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1356. China's opening oral statement at the second substantive meeting, para. 368.

its finding that the *CCCMC Coordination Measures*, among other measures, was outside the Panel's terms of reference. Therefore, the Panel will not make findings on this measure.

(c) Summary

7.957 The Panel concludes above that licences that are granted without condition or those that implement an underlying measure that is justified pursuant to another provision of the WTO Agreement, such as GATT Article XI:2, XII, XVIII, XIX, XX or XXI, may be consistent with Article XI:1, so long as the licence does not by its nature have a limiting or restrictive effect. Conversely, a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence *application*.

7.958 The Panel finds that China's export licensing regime is not *per se* inconsistent with Article XI:1 on the basis that it permits export licensing agencies to require a licence for "goods subject to ... export restrictions", as provided for in Article 19 of China's *Foreign Trade Law*. The Panel finds, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's *2008 Export Licence Administration Measures*, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's *Working Rules on Export Licenses*, amounts to an additional restriction inconsistent with Article XI:1.

7.959 The Panel makes no findings as to whether the claims of the United States and Mexico that 40(3) of China's *Measures for the Administration of Licensing Entities* or Article 21 of the *CCCMC Coordination Measures* are inconsistent with GATT Article XI:1, as these measures fall outside its terms of reference. The Panel will consider in Section VII.G below whether Article 40(3) of China's *Measures for the Administration of Licensing Entities* is inconsistent with Article XI:1 of the GATT 1994.

3. Whether China's export licensing system on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report

7.960 In addition to their challenge under Article XI:1 of the GATT 1994, the complainants argue that China's export licensing system applied to bauxite, coke, fluorspar, manganese, silicon carbide and zinc is also inconsistent with China's obligations in Paragraph 1.2 of China's Accession Protocol read in combination with Paragraphs 162 and 165 of China's Working Party Report.[1357] The complainants argue that China committed to eliminate any non-automatic export licence requirements and to remove export restrictions unless they could be justified.

7.961 To the extent the Panel finds China's export licence requirement to be inconsistent with Article

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1357. United States' first written submission, paras. 343-347; European Union's first written submission, paras. 323-324; Mexico's first written submission, paras. 345-349.

XI:1, China requests that the Panel exercise judicial economy with respect to claims under Paragraphs 162 and 165 of its Working Party Report. China considers the complainants' claims under these provisions to be "identical" to those under Article XI:1, as assumed by all Members under Article XI:1. It argues that making findings under these provisions "would add nothing to the resolution of this dispute, nor would it aid in any potential implementation."[1358] Regardless, as discussed in the context of the complainants' Article XI:1 claim above, China submits that its export licence requirement is automatic and therefore places no restriction or limit on the quantity of exports of bauxite, coke, fluorspar, manganese, silicon carbide and zinc. China additionally considers that it has "taken steps ... to ensure that it ... abides by WTO rules in respect of non-automatic licensing."[1359] For these reasons, China considers that it has not acted inconsistently with Paragraphs 162 and 165 of its Working Party Report.

7.962 The Panel recalls that Article 1.2 of China's Accession Protocol is an "integral part of the WTO Agreement" and therefore contains enforceable commitments including those "commitments referred to in paragraph 342 of the Working Party Report"[1360]

1358. China's first written submission, para. 808, referring to Panel Report, *EC – Salmon*, para. 7.636.

1359. China's response to second set of Panel questions, question No. 66.

1360. China's Accession Protocol (Exhibit JE-2); see paras. 7.620 to 7.621 above.

Paragraph 342 of China's Working Party Report additionally refers to commitments undertaken by China that are reproduced in paragraphs 162 and 165 of the Working Party Report.

7.963 Paragraph 162 of China's Working Party Report provides:

> "...China confirmed that China would abide by WTO rules in respect of nonautomatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions..."

7.964 Paragraph 165 of China's Working Party Report provides:

> "...China confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Draft Protocol..."

7.965 Thus, Paragraph 162 requires that China's export licensing requirements, to the extent they are "non-automatic", would be brought into conformity with the GATT. Under the second sentence of Paragraph 162, export licensing or restrictions may only be applied if justified under an provision of the GATT.

7.966 The Panel concluded above that China's export licence system as imposed on bauxite, fluorspar, silicon carbide, coke and zinc is not inconsistent with GATT Article XI:1 because of the mere fact that it applies to "goods subject to ... export restrictions". The Panel found, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's Export Licensing Measures, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's Working Rules on Export Licenses, amounts to an additional restriction inconsistent with Article XI:1. China did not seek to justify any aspect of its export licensing system under any provision of the GATT 1994.

7.967 The Panel recalls that China requested the Panel to exercise judicial economy in respect of the complainants' additional claims under Paragraphs 162 and 165 of China's Working Party Report. The Appellate Body has stated that panels are not obliged to address all legal claims raised by parties, explaining that "[n]othing in [Article 11 of the DSU][1361] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the

1361. Article 11 of the DSU provides, in relevant part: "...a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

complaining party."[1362] The Appellate Body later explained that "a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of the disputes to the benefits of Members."[1363]

7.968 Paragraph 162 provides that export licensing may only be applied if justified under any provision of the GATT. Paragraph 165 provides that "non-automatic restrictions" would be eliminated unless they could be justified under the WTO Agreement or Draft Protocol. In the latter respect, the term "non-automatic restrictions" is not defined, although Paragraph 162 notably refers to "restrictions" and "licensing" separately.

7.969 It would seem that three outcomes may arise in respect of China's export licensing requirements at issue. First, the export licensing requirements at issue may be inconsistent with a provision of the WTO Agreement and may not be justified. Second, the export licensing requirements may be inconsistent with a particular provision, such as Article XI:1 of the GATT but may be justified by a provision of the WTO Agreement. Third,

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1362. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1997:I, 323, at p. 339; DSR 1997:I, at p. 339-340 citing inter alia, *EEC – Import Restrictions*, BISD 30S/129, para. 33; *Canada –FIRA*, BISD 30S/140, para. 5.16; *US –Sugar Quota*, BISD 31S/67, paras. 4.5-4.6; *Japan – Semi-Conductors*, BISD 35S/116, para. 122; and *US –MFN Footwear*, BISD 39S/128, para. 6.18.

1363. Appellate Body Report, *Australia – Salmon*, para. 223.

as explained above, the export licensing requirements may not be inconsistent with any particular provision of the GATT. Under each circumstance, the question arises whether the particular licensing requirements would nevertheless be inconsistent with China's Accession Protocol.

7.970 The Panel does not consider that findings under Paragraph 162 or Paragraph 165 would be required to resolve the dispute in the first case, discussed in the preceding paragraph, i.e., where export licensing requirements at issue may be inconsistent with a provision of the WTO Agreement and may not be justified. The Panel recalls its conclusion that, if particular export requirements operate such that by their nature they have a restrictive or limiting effect on exportation beyond the restriction arising from the underlying permissible restriction itself, then such requirements would not be permissible under Article XI:1 of the GATT 1994. In this dispute, for goods subject to export licensing administration only, the Panel concluded that the requirements of Article 11(7) of *2008 Export Licence Administration Measures* and Articles 5(5) and 8(4) of *2008 Export Licensing Working Rules* are inconsistent with Article XI:1 for this reason. China has not sought to justify these requirements under any provision of the WTO Agreement. In the Panel's view, no additional finding of violation under Paragraph 162 or Paragraph 165 would add to resolving the matter.

7.971 The Panel further does not see how findings under Paragraph 162 or Paragraph 165 would be required to resolve the dispute where export licensing requirements may be inconsistent but may be justified by a provision

of the WTO Agreement. If particular export licensing requirements are inconsistent but somehow justified, then, by the terms of Paragraph 162 and Paragraph 165 of China's Working Party Report, those requirements may be applied. Again, no finding under Paragraph 162 or Paragraph 165 would aid or in fact is needed to resolve the matter.

7.972 Finally, the question arises whether findings in respect of Paragraph 162 or Paragraph 165 would be required to resolve the dispute where an export licensing requirement may not be inconsistent with any particular GATT provision. The Panel concluded above that the export licensing requirement imposed under China's *Foreign Trade Law* applied to "goods subject to ... export restrictions" is not *per se* inconsistent with Article XI:1. In this dispute, the complainants have not submitted evidence beyond the text of certain provisions of China's *Foreign Trade Law* to demonstrate that export licensing applied to the raw materials at issue imposes additional restrictions to those which may arise from the underlying export quota. The Panel explained its view above that the inquiry whether or not a licence requirement is or is not permissible under Article XI:1 does not end at the text of the measure imposing the licensing requirement. In the absence of further evidence, the Panel considers that additional findings under Paragraphs 162 and 165 of China's Working Party Report would not aid in resolving the dispute.[1364] The Panel declines to consider

1364. The Panel additionally takes note, as raised by China in its 18 March comments to the Panel, that the complainants have presented new argumentation, at a late stage in the proceedings, in

the complainants' claim while bearing in mind its findings that the underlying export quotas at issue are not justified pursuant to Article XI:2 or Article XX of the GATT 1994, and bearing in mind that China has not sought to justify its export licensing regime pursuant to any provision of the GATT or the WTO Agreement.

7.973 For the foregoing reasons, the Panel declines to make findings under Paragraphs 162 and 165 of China's Working Party Report.

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arguing that China's export licensing requirements are inconsistent with Paragraphs 162 and 165 of China's Working Party Report. See United States' response to Panel question Nos. 61 and 64 following the second substantive meeting; European Union's response to Panel question No. 61 following the second substantive meeting; Mexico's response to Panel question Nos. 61 and 64 following the second substantive meeting; United States' comments on China's response to Panel question Nos. 61 and 66 following the second substantive meeting; European Union's comments on China's response to Panel question Nos. 61 and 66 following the second substantive meeting; Mexico's comments on China's response to Panel question Nos. 61 and 66 following the second substantive meeting. The European Union argues in particular that that Paragraph 162 "introduces a specific obligation for export licences in general, irrespective of whether they are 'automatic' or 'non-automatic'" – namely, that such licenses "would only be applied ... where ... justified by GATT provisions". European Union's comments on China's response to Panel question No. 66 following the second substantive meeting, paras. 85 and 86. China submits that this position fundamentally changes the nature of the European Union's claim and compromises due process.

4. Whether China's export licensing system on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with paragraph 1.2 and 5.1 of China's Accession Protocol and paragraphs 83 and 84 of China's Working Party Report

7.974 In addition to its claims under Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report, the European Union argues that China's export licensing system is inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with paragraphs 83 and 84 of China's Working Party Report. The European Union argues that China's licensing system amounts to an "examination and approval of trading rights" system in violation of paragraph 84(a) of China's Working Party Report.[1365] By allowing licence issuing agencies discretion to require undefined "other" documents, the European Union argues that China fails to grant to "all enterprises" in China the right to trade the raw materials at issue in violation of Paragraphs 83(d) and 84(a) of China's Working Party Report.[1366] Finally, by granting "broad and unfettered discretion" to export licensing agencies to either accept or refuse applications by foreign enterprises and individuals, the European Union argues that China fails to grant foreign enterprises and individuals the right to trade in a non-discriminatory manner, in violation of paragraph 84(b) of China's Working Party Report.[1367]

1365. European Union's first written submission, para. 334.

1366. European Union's first written submission, para. 335.

1367. European Union's first written submission, para. 336.

7.975 To the extent the Panel finds China's export licence requirements to be inconsistent with Article XI:1, China requests that the Panel also exercise judicial economy with respect to the complainants' claims. China considers these claims are "identical" to those under Article XI:1, and that making findings under these provisions "'would add nothing to the resolution of this dispute, nor would it aid in any potential implementation.'"[1368] Regardless, as discussed in the context of the complainants' Article XI:1 claim above, China submits that its licensing system does not restrict or limit on the quantity of exports of bauxite, coke, fluorspar, manganese, silicon carbide and zinc. Thus, China requests the Panel to reject the European Union's claims.

7.976 The Panel recalls that Article 5.1 of China's Accession Protocol provides:

> "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...within three years after accession, all enterprises in China shall have the right to trade in all goods...except for those goods listed in Annex 2A... Such right to trade shall be the right to import and export goods...For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period."

1368. China's first written submission, para. 811, referring to Panel Report, *EC – Salmon*, para. 7.636.

7.977 As noted, Article 1.2 of China's Accession Protocol is an "integral part of the WTO Agreement" and therefore contains enforceable commitments including those "commitments referred to in paragraph 342 of the Working Party Report"[1369] Paragraph 342 of China's Working Party Report additionally refers to commitments undertaken by China that are reproduced in paragraphs 83 and 84 of the Working Party Report.

7.978 Paragraph 83(d) of China's Working Party Report provides:

> "...China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade."

7.979 Paragraph 84(a) of China's Working Party Report provides:

> "...China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals...to export...all goods..."

7.980 Paragraph 84(b) of China's Working Party Report provides:

> "With respect to the grant of trading rights to foreign enterprises and individuals... China confirmed that such rights would be granted in a non-discriminatory and nondiscretionary

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1369. China's Accession Protocol (Exhibit JE-2); see paras. 7.620 to 7.621 above.

> way....[A]ny requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade..."

7.981 As noted in paragraph 7.653 above, the Appellate Body in *China – Audiovisual Products and Services*, addressed the meaning of China's right to regulate trade under Article 5.1 of China's Accession Protocol. Of particular relevance to these claims of the complainants, the Appellate Body explained that the "obligations assumed by China in respect of trading rights, which relate to traders" is "closely intertwined" with "obligations imposed on all WTO Members in respect of their regulation of trade in goods", including those under Article XI of the GATT 1994.[1370]

7.982 The Panel concluded in paragraph 7.938 above that China's export license system as imposed on bauxite, fluorspar, silicon carbide, coke and zinc is not inconsistent with GATT Article XI:1 because of the mere fact that it applies to "goods subject to ... export restrictions". The Panel found, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's Export Licensing Measures, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's Working Rules on Export Licenses, amounts to an additional restriction inconsistent with Article XI:1. China

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1370. Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226.

did not seek to justify any aspect of its export licensing system under any provision of the GATT 1994.

7.983 The Panel fails to see how further findings in respect of Paragraphs 83 and 84 of China's Working Party Report would aid in resolving the dispute. The Panel recalls that China requested the Panel to exercise judicial economy in respect of the European Union's claims. As mentioned in paragraph 7.967 above, the Appellate Body has clarified that "a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties."[1371] In light of its finding that the requirements of Article 11(7) of China's Export Licensing Measures and Articles 5(5) and 8(4) of China's Working Rules on Export Licenses are inconsistent with GATT Article XI:1, and are not justified, the Panel considers that further findings on this matter would not be necessary to resolve the dispute. Therefore, the Panel does not make findings in this regard.

G. MINIMUM EXPORT PRICES

7.984 The complainants claim that China imposes a minimum export price (MEP) requirement for certain forms of bauxite coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc[1372] that constitutes a restriction on exportation that is inconsistent with Article XI:1 of the GATT 1994. They submit that coordination of export prices continued to be enforced through application

1371. Appellate Body Report, *India – Patents (US)*, para. 87.

1372. The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.

of the Price Verification and Chop (PVC) export clearance process even after the apparent repeal of this procedure in 26 May 2008.[1373] The complainants further claim that the manner in which China administers the MEP requirement through the involvement of the CCCMC in the PVC export clearance process is inconsistent with the obligation to administer laws in a uniform, impartial and reasonable manner under Article X:3(a) of the GATT 1994.[1374] Finally, the complainants claim that China failed to publish certain measures providing rules and details on how the CCCMC coordinates export prices in contravention of Article X:1 of the GATT 1994.[1375]

7.985 China contends that it "abandoned" price coordination in 2008 before the Panel's establishment[1376], and therefore requests the Panel not to make findings on measures identified in connection with the complainants' MEP-related claims. In addition, China asserts that the complainants have failed to establish that China continued to impose and enforce an MEP requirement

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1373. United States' first written submission, paras. 360-361; European Union's first written submission, paras. 364-365; Mexico's first written submission, paras. 363-364.

1374. United States' first written submission, paras. 364-374; European Union's first written submission, paras. 368-378; Mexico's first written submission, paras. 367-377.

1375. United States' first written submission, paras. 375-381; European Union's first written submission, paras. 379-385; Mexico's first written submission, paras. 378-384.

1376. China's first written submission, para. 838; China's response to Panel question No. 1, para. 20.

after the repeal of export price coordination in 2008[1377], or that an alleged MEP-requirement restricts export in a manner inconsistent with Article XI:1.[1378] Finally, China asserts that the Panel should not make findings on the complainants' claims under Articles X:1 and X:3(a) of the GATT 1994. China submits that the Panel should not make findings on measures governing the administration of the PVC system because such system was repealed and the measures no longer exist.[1379] China further argues that the measures which are alleged not to have been published either no longer apply or have been formally repealed, and therefore require no publication pursuant to Article X:1 of the GATT 1994.[1380]

7.986 The Panel will address the complainants' claims under Articles XI:1, X:1 and X:3(a) of the GATT 1994 separately below. Before doing so, the Panel will address measures within its terms of reference. The Panel will then address China's claim that it effectively abandoned export price coordination in 2008, prior to the Panel's establishment. Thereafter, we will consider the complainants' assertion that China continued to enforce export price coordination, even after the repeal of the PVC procedure by the 2008 PVC Notice. In the event that China had in a place a minimum price requirement at the time of the Panel's establishment, we will address

1377. China's first written submission, paras. 842-853.

1378. China's first written submission, paras. 854-865.

1379. China's first written submission, para. 867.

1380. China's first written submission, paras. 868-872.

whether this requirement is inconsistent with Articles XI:1, X:1 and X:3(a).

1. MEP-related measures within the Panel's terms of reference

7.987 The Panel recalls from its 1 October 2010 preliminary ruling its finding that only six measures referred to by the complainants in both their consultation requests and Panel Requests would form part of the Panel's terms of reference.[1381] In its preliminary ruling request, China asked the Panel to find, *inter alia*, that the complainants' Panel Requests failed to comply with the requirements of Article 6.2 of the DSU because "Section III" of the complainants' Panel Requests did not identify clearly and specifically the measures under challenge, including those concerning its MEP-related claims, or provide a brief summary of the legal basis sufficient to present the problem clearly.[1382]

7.988 To recall, in their Panel Requests, the complainants identified nine measures that related to their MEP-related claims. Three of these measures were not listed in the complainants' consultation requests. In the first phase of its preliminary ruling, the Panel stated that it would reserve its decision on whether "Section III" of the complainants' Panel Requests identify clearly and specifically the measures under challenge (including the complainants' MEP-related claims), and whether "Section

1381. See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

1382. The text of the complainants' Panel Requests is identical.

III" of their requests provides a brief summary of the legal basis sufficient to present the problem clearly, until after it had received the complainants' first written submissions.

7.989 In their first written submissions, the complainants referred to six additional MEP-related measures that were not included in their consultation or Panel Requests. The complainants did not indicate any particular basis for mentioning these additional measures in their first written submissions.

7.990 Following receipt of the complainants' and China's first written submissions, the Panel asked the complainants to indicate which measures are properly before the Panel whether due to their inclusion in the consultation and/or Panel Request, or as an amendment, extension, replacement measure, renewal measure or implementing measure.[1383] The complainants indicated which measures that they considered to be in the Panel's terms of reference.[1384]

7.991 On 1 October 2010, the Panel issued the second phase of its preliminary ruling. The Panel concluded that the complainants' Panel Requests, as clarified by their first submissions, provide sufficient connection between the measures listed in "Section III" and the listed claims of violations, with the exception of the European Union's publication claim concerning coke quotas. In addition, the Panel concluded that alleged measures referred to solely

1383. Panel question No. 1(a) and (b).

1384. See complainants' response to Panel question No. 1 following the first substantive meeting; United States' Attachment – Chart A re Question 1(a) & (b).

in the complainants' Panel Requests, but not in their consultation requests, and those alleged measures referred to by the complainants in their subsequent submissions, were not properly before the Panel as measures at issue. On this basis, the Panel concluded that only six MEP-related measures remained in the Panel's terms of reference. These are: (1) *Measures for Administration of Trade Social Organizations*[1385]; (2) *Regulations for Personnel Management of Chambers of Commerce*[1386]; (3) *1994 CCCMC Charter*[1387]; (4) *2001 CCCMC Charter*[1388]; (5) *Export Price Penalties Regulations*[1389]; and (6) *Measures for Administration of Licensing Entities.*[1390]

7.992 The complainants submit that the Panel's findings in the second phase of its preliminary ruling that certain MEP-related measures are outside the Panel's terms of reference were not made in response to a preliminary ruling request and cannot be part of a ruling. The United States argues that the findings pertaining to MEP-related measures in the second phase of the Panel's preliminary ruling were not made in response to a preliminary ruling under the Panel's Working Procedures. Moreover, it argues that China's first written submission did not include a request for a preliminary ruling. Even if China

1385. Exhibits CHN-313, JE-101.

1386. Exhibits CHN-315, JE-102.

1387. Exhibit JE-86.

1388. Exhibits CHN-16, JE-87.

1389. Exhibits CHN-350, JE-113.

1390. Exhibits CHN-358, JE-75.

had made a second preliminary ruling request, the United States argues that the Panel did not determine a time prior to the first substantive meeting for the complainants to respond to China's terms of reference arguments on the MEP-related measures. Therefore, the complainants consider the aspects of the Panel's preliminary ruling regarding these measures to be invalid and request the Panel to re-examine *de novo* its decision on these measures.[1391] The United States submits further that, under the DSU and Panel's Working Procedures, the complainants are permitted to make rebuttals – including on the status of excluded MEP-related measures – until the second substantive meeting.[1392]

7.993 The Panel considers that it was permitted to address whether the particular MEP-related measures that either were not listed in the complainants' consultation requests, or were not included in their Panel Requests, were within its terms of reference. The Appellate Body clarified that Panels may address "issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters ... if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed".[1393] The Panel sought to clarify the scope of its mandate concerning the complainants' MEP-related claims.

1391. United States' second written submission, paras. 408-414.

1392. United States' second written submission, para. 416.

1393. Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

7.994 With respect to three measures relating to the PVC procedure that were included in the Panel Requests but not the consultations requests[1394], the Panel notes that all of the particular measures sought to be included in the Panel's terms of reference existed well in advance of the time of consultations and the submission of the complainants' Panel Requests. These additional instruments are not amendments to any of the measures listed in the consultation requests that came into existence between the time of consultations and submission of the Panel Requests. The Panel fails to see any basis for the complainants not to have included these measures, due to the fact that these measures were available to the complainants. Moreover, these measures as presented to the Panel do not identify any of the products at issue in this dispute.[1395]

1394. In particular, *Notice of the Rules on Price Reviews of Export Products by the Customs* (not submitted); *CCCMC PVC Rules* (Exhibit JE-127); and *Online PVC Instructions* (Exhibit JE-123).

1395. The complainants consider that those instruments included in the Panel Requests but not the consultations requests should be considered as measures at issue in this dispute because the measures are "all part of the same PVC procedure of which the *2002 PVC Notice* (Exhibit JE-122) and *2004 PVC Notice* (Exhibit JE-121), which were consulted on, form a part", and because these additional instruments "relate to the same procedure and same product at issue under the 2002 PVC Notice and the 2004 PVC Notice". The complainants argue that the inclusion of these measures therefore does not "expand the scope of the dispute". (See, e.g., United States' second written submission, para. 440). The complainants consider that the Appellate Body Report on *US – Continued Zeroing* is "apposite" to an assessment of whether

7.995 Similarly, with respect to measures that are not included in either the consultation or Panel Requests, but are alleged to be "implementing" measures, the Panel again notes that all of the alleged additional "implementing measures" set out by the complainants in their first written submissions[1396] existed well in advance of the time of consultations and the submission of the complainants' Panel Requests. The Panel thus sees no reason why the complainants opted to delay or withhold identifying these measures. It is evident from the complainants' submissions that these measures were identified in connection with

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the additional PVC measures should be included in the Panel's terms of reference. We note, however, that the Appellate Body in that appeal found that the measures subject to the complainant's challenge "encompass[ed] the anti-dumping duties resulting from the proceedings identified in the consultations request" and "additional measures relate to the same duties identified in the consultations request, and the legal basis of the claims raised is the same". (Appellate Body Report on *US – Continued Zeroing*, paras. 226, 228) As noted, the complainants have not provided cogent reasons for the failure to raise these measures at the time of consultations. Moreover, the complainants' submitted versions of the 2002 and 2004 PVC Notices, which are alleged to form the basis for the later inclusion of the *Notice of the Rules on Price Reviews of Export Products by the Customs* (not submitted); *CCCMC PVC Rules* (Exhibit JE-127); and *Online PVC Instructions* (Exhibit JE-123) do not include reference to any of the raw materials at issue in this dispute.

1396. In particular, *CCCMC Export Coordination Measures* (Exhibit JE-107); *CCCMC Bauxite Branch Coordination Measures* (Exhibit JE-108); *Bauxite Branch Charter* (Exhibit JE-112); and "system of self discipline" (see complainants' first written submission, paragraph 205).

statements made and evidence submitted in the context of various US court proceedings concerning allegations of price-fixing and other anticompetitive activities, dating as far back as 2006.[1397] In addition, the complainants failed to offer any elaboration as to how these measures are "implementing measures" to basic framework laws until the conclusion of their second written submissions.[1398]

7.996 For the foregoing reasons, and in light of its preliminary ruling, the Panel will limit any rulings on the complainants' MEP-related claims to the six measures that appear in the complainants' Panel Requests. Notwithstanding this view, the Panel may consider other instruments and documents referred to by the complainants – though outside its terms of reference – in order to assess fully the legal situation and operation of an MEP requirement in China.[1399] The Panel does not consider the fact that certain measures are outside the Panel's terms of reference to mean that such laws, regulations or instruments did or do not exist, or should

1397. See United States' first written submission, paras. 207-208, fns. 284, 285, 288, 289, 209; MOFCOM Statement in *In re Vitamin C Antitrust Litigation*, para. 3 (Exhibit JE-111).

1398. The complainants argue in their second written submissions that measures may be included in a panel's terms of reference if the panel request refers to "implementing measures", and those measures can be considered to "implement" measures that are specifically identified in the panel request. See United States' second written submission, para 421, citing Panel Report, *Japan – Film*, para 10.8.

1399. Appellate Body Report, *EC – Selected Customs Matters*, para. 188 (stating that "[a] panel is not precluded from assessing a piece of evidence for the mere reason that it pre dates or post-dates its establishment").

be completely excluded from the Panel's assessment. The Panel will not, however, make findings or recommendations on any laws, regulations or instruments that are excluded from its terms of reference.

2. Whether China enforced a coordinated MEP requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc at the time of the Panel's establishment

7.997 The complainants argue that China imposes an MEP requirement for certain forms of bauxite coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc.[1400] The complainants argue that China coordinates export prices for the products at issue through a "system of self-discipline" based on informal statements and oral agreements between traders and export regulators and where the CCCMC directs commodity-specific branches or coordination groups.[1401] The complainants submit price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.[1402] The complainants also allege that China

1400. The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.

1401. United States' first written submission, para. 349-351; European Communities' first written submission, para. 353-355; Mexico's first written submission, para. 352-354; United States' comments on China's response to Panel question No. 10; CCCMC website pages, 5-7 (Exhibit JE-88).

1402. See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second

enforces these coordinated export prices through the application of penalties imposed by MOFCOM against nonconforming exporters as well as penalties imposed against licensing authorities that issue licences to non-conforming exporters.[1403] Finally, the complainants allege that China enforces coordinated prices, at least on yellow phosphorus through the use of the PVC procedure which permits customs authorities to deny clearance to yellow phosphorus exports that do not conform to the minimum coordinated price.[1404] The complainants submit evidence of price data and screenshots of online web pages from 2008 and 2009 in arguing that the coordination of export prices continued to be enforced through application of the PVC export clearance process even after the apparent repeal of this procedure on 26 May 2008.[1405]

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written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit JE-126.

1403. United States' first written submission, paras. 352-355; European Union's first written submission, para. 356-359; Mexico's first written submission, para. 355-358; Complainants' response to Panel question No. 13.

1404. United States' first written submission, paras. 356-359; European Communities' first written submission, paras. 360-363; Mexico's first written submission, paras. 359-362; Complainants' response to Panel question No. 11.

1405. United States' first written submission, paras. 357, 360; European Communities' first written submission, paras. 361, 364; Mexico's first written submission, paras. 360, 363; United States' second written submission, paras. 448, 450; European Union's second written submission, para. 172; Mexico's first written submission, paras. 365, 368.

7.998 China alleges that it abandoned price coordination in 2008 through measures submitted by MOFCOM[1406], and requests the Panel not make findings in respect of the complainants' MEP-related claims. Prior to 2008, China submits that it designated MOFCOM to coordinate export prices to minimize the possibility of injurious dumping of Chinese exports by individual exporters.[1407] China argues that it repealed a number of measures that authorized the coordination of export prices, the sanction of exporter licensing entities, and use of the PVC procedure.[1408] It considers that any outstanding measures that were not formally repealed became effectively "inapplicable".[1409] China considers that findings on these measures would serve no purpose because the measures do not have legal effect such that they could violate WTO obligations or nullify or impair benefits.[1410] China further submits that the complainants have not provided evidence – either through reference to events that occurred between 2001 and 2007[1411], screenshots taken from the CCCMC website after 2008[1412] or price data on yellow phosphorus and

1406. China's response to Panel question No. 1, para. 20.

1407. China's first written submission, paras. 838-847; China's second written submission, para. 565; *Normal Export Price Provisions*, Article 5 (Exhibit CHN-50).

1408. China's first written submission, para. 838.

1409. China's second written submission, paras. 567-570; Exhibit CHN-438.

1410. China's first written submission, paras. 47, 52, 57-67.

1411. China's first written submission, paras. 842.

1412. China's first written submission, paras. 839, 843.

bauxite taken in May 2008[1413] – to support its allegations that enterprises were required to coordinate export prices after 2008.

7.999 The Panel will address the various allegations by the complainants that China enforces an MEP requirement on exporters of certain raw materials. The Panel explained above that it would not make rulings or recommendations on any laws, regulations or instruments that are excluded from its terms of reference, but may consider them in assessing fully the legal situation and operation of an MEP requirement in China.

7.1000 The Panel will first consider whether these measures may form the basis of a WTO violation. Then, the Panel will assess the operation of these measures and whether these measures remain in force or have been repealed as argued by China. Finally, the Panel will consider the complainants' allegation that China continued to coordinate and enforce an MEP requirement even after the apparent repeal of this procedure on 26 May 2008.

(a) Whether the measures at issue may be subject to WTO dispute settlement

7.1001 A first issue facing the Panel is whether the measures presented by the complainants can be considered WTO measures under the DSU and WTO Dispute Settlement Mechanism for purposes of the complainants' claims. The Panel recalls that certain of the measures identified by the complainants are not formal legislation

1413. China's first written submission, para. 851, Exhibits CHN-361, CHN-362, CHN-363.

but are charters and regulations of non-governmental bodies, such as the CCCMC or CCCMC Bauxite Branch.

7.1002 The complainants argue that China's Chambers of Commerce, including the CCCMC, "function as entities under MOFCOM's direct and active supervision and, accordingly, play a central role in regulating the trade of China's industries".[1414] Through its intervention in a 2006 US court proceeding[1415], the complainants submit that China referred to its authority over China's Chambers of Commerce, including the CCCMC, as established through various provisions of the Measures for Administration of Trade Social Organizations[1416] and the Regulations for Personnel Management of Chambers of Commerce.[1417] The complainants submit that China described its authority over these entities as "plenary" and described the Chamber of Commerce as "the instrumentality through which [MOFCOM] oversees and regulates the business

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1414. United State's first written submission, para. 207, referring to Brief of Amicus Curiae: MOFCOM. *In Re Vitamin C Antitrust Litigation* (E.D. NY Jun. 26, 2006), at p. 5 (Exhibit JE-98).

1415. United States' first written submission, para. 208. In footnote 285, the United States notes the statement by the US presiding judge in the Opinion *In re Vitamin C Antitrust Litigation* that "The Chinese government's appearance as *amicus curiae* is unprecedented. It has never ... come before the United States as *amicus* to present its views" See *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546 (E.D. NY Nov. 6, 2008), at p. 546-55 (Exhibit JE-103).

1416. Exhibit JE-101, Article 14.

1417. Exhibit JE-102.

of importing and exporting [] products in China".[1418] On this basis, the complainants consider that the CCCMC's export-price related functions and responsibilities are attributable to China.[1419]

7.1003 China has asserted that certain measures are not "sources of Chinese law".[1420] China admits that MOFCOM and the GAC delegated certain implementing

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1418. United States' first written submission, para. 208, citing Brief of Amicus Curiae: MOFCOM at p. 9 (Exhibit JE-98); United States' response to Panel question 67 following the second substantive meeting para. 133; European Union's response to Panel question 67 following the second substantive meeting; Mexico's response to Panel question 67 following the second substantive meeting.

1419. In addition, the complainants claim that China's MOFCOM itself considers the CCCMC as an "'instrumentality through which [MOFCOM] oversees and regulates the business of importing and exporting [] products in China.'" United States' first written submission, para. 208, fn. 290, citing Brief of Amicus Curiae: MOFCOM. *In Re Vitamin C Antitrust Litigation* (E.D. NY Jun. 26, 2006), at p. 9 (Exhibit JE-98); see also Memorandum in Support of Defendants' Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tiajin Co.* (Oct. 7, 2008) at p. 9 (Exhibit JE-105), Memorandum in Support of Motion to Dismiss Plaintiffs' First Amended Class Action Complaint by Defendants, China Minmetals Corp. and China National Minerals Co. in *Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp.* (D. NJ Jun. 26, 2009) at p. 11 (Exhibit JE-106).

1420. China's response to Panel question No. 1, para. 14 following the first substantive meeting.

authority to the CCCMC to coordinate export prices[1421], but it explains that with the repeal of the PVC system in 2008, implementation authority granted to CCCMC terminated.[1422]

7.1004 Article 3.3 of the DSU allows WTO Members to resort to the dispute settlement system of the WTO in "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". In *US –Corrosion Resistant Steel Sunset Reviews*, the Appellate Body explained that "[i]n principle, any act or omission *attributable* to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[1423] Thus, governmental actions may clearly be challenged under dispute settlement proceedings. Private actions have also been found to be "attributable" to a government, and thus

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1421. China states that MOFCOM and the GAC, acting under the State Council, enjoy authority over the administration of customs-related matters, foreign trade, investment, and economic cooperation in China. See China's response to Panel question No. 1, para. 21 following the first substantive meeting.

1422. China's response to Panel question No. 1 following the first substantive meeting, para. 21; China submits that the CCCMC affirmed that any document pertaining to the PVC system has not been applied since 2008. See *Resolution of the Fifth Standing Committee of the CCCMC on Abolishing Certain Documents Including Measures of the CCCMC on the Coordination and Administration of Export Commodities* (Exhibit CHN-4).

1423. Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81 (emphasis added).

subject to challenge, where there is "some governmental connection to or endorsement of those actions".[1424] For instance, the panel in *Japan – Film* concluded, as the GATT panel on *Japan-Semi-conductors* before it, that "administrative guidance" that "creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner" may constitute a governmental measure.[1425]

7.1005 China acknowledges that through MOFCOM and the GAC it delegated certain implementing authority to the CCCMC to coordinate export prices. Evidence presented by the complainants in the form of statements made by China's MOFCOM in the context of US domestic court proceedings prior to this dispute appear to confirm this fact. In the Panel's view, this confirms that actions undertaken by the CCCMC with respect to minimum export price requirements at issue in this dispute are attributable to China, and are thus "measures" that can be challenged under the WTO dispute settlement proceedings. In addition, China does not dispute that

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1424. Panel Report, *Japan – Film*, para. 10.52.

1425. Panel Report, *Japan – Film*, para. 10.45. The GATT panel in *Japan – Semi-conductors* held that, in cases where "sufficient incentives or disincentives existed for non-mandatory measures to take effect" and "the operation of measures ... was essentially dependent on [g]overnment action or intervention", then "the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance ..." GATT Panel Report, *Japan – Semi-conductors*, para. 109.

it, through MOFCOM, regulates the administration of licence issuance and, through China's Customs, regulates customs clearance proceedings.

7.1006 Accordingly, the Panel is satisfied that the measures at issue in this dispute that have been identified by the complainants are measures "attributable" to China. The Panel will therefore consider whether these measures remained in force at the time of the Panel's establishment, and whether the measures operate as a minimum export price requirement that is inconsistent with Article XI:1 of the GATT 1994, as alleged by the complainants.

(b) Whether China requires exporters to coordinate minimum export prices on exports of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc

7.1007 The Panel will assess whether the measures identified by the complainants remained in force at the time of the Panel's establishment, and whether these measures establish the existence of an MEP requirement. First, the Panel will asses whether China through the various CCCMC measures directs exporters of the raw materials to coordinate export prices. Second, the Panel will assess whether China requires exporters to adhere to coordinated export prices through: (i) penalties imposed on exporters that fail to set prices in accordance with the coordinated export prices; (ii) penalties imposed on licensing entities that issue licences to non-complying exporters; and (iii) application of the PVC export clearance process. The Panel will also assess the complainants' assertion that China otherwise enforced coordinated

minimum export prices after the Panel's establishment despite the repeal of certain measures.

(i) Whether China through the CCCMC coordinates export prices

7.1008 The complainants argue that the (1) *1994 CCCMC Charter*[1426]; (2) *2001 CCCMC Charter*[1427]; (3) *CCCMC Export Coordination Measures*[1428]; (4) CCCMC Brochure[1429] and CCCMC website pages[1430]; (5) *CCCMC Bauxite Branch Coordination Measures*[1431]; and (6) *CCCMC Bauxite Branch Charter*[1432] establish that China, through the CCCMC coordinates export prices. In particular, under the *1994* and *2001 CCCMC Charters*, *CCCMC Export Coordination Measures* and *CCCMC Bauxite Branch Charter*, the complainants submit that the CCCMC directs commodity-specific branches or coordination groups to coordinate export prices for the relevant commodities.[1433]

1426. Articles 3, 6, 14 (Exhibit JE-86).

1427. Articles 3, 6, 14 (Exhibits CHN-16, JE-87).

1428. Article 2, 4(3) and 18, 19, 20, 21 (Exhibit JE-107).

1429. Exhibit JE-89, p.14.

1430. Exhibit JE-88 pages 3-5.

1431. Articles 1, 4, 7, 21 (Exhibit JE-108).

1432. Articles 8, 20(3), 45 (Exhibit JE-112).

1433. United States' first written submission, para. 350; European Union's first written submission, para. 354; Mexico's first written submission, para. 353; United States' comments on China's response to Panel question No. 10 following the first substantive meeting para 25; CCCMC website pages, 5-7 (Exhibit JE-88).

The complainants refer to official statements by China's MOFCOM[1434] and documents submitted by exporters and members of the CCCMC to support their allegation that the CCCMC coordinates export prices.[1435] Finally, the complainants submit price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.[1436] Only the 1994 and 2001 CCCMC Charters remain in the Panel's terms of reference.

7.1009 Article 6 of the *1994 CCCMC Charter* indicates that the CCCMC should "coordinate[e] ... the industry's import and export prices, markets and customers etc. in accordance with the National Authorities' opinions or on the basis of the joint requests and industry agreements

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1434. See, e.g., MOFTEC Assistant Minister Liu Xiangdong's Speech to the Third Congress of the CCCMC, paras. 10-11 (Exhibit JE-109); *1998 Price Coordination Circular*, paras. 2 and 4 (Exhibit JE-110); CCCMC Website Pages, para. 3 (Exhibit JE-88); CCCMC Brochure, para. 4 (Exhibit JE-89).

1435. United States' first written submission, para. 351; European Union's first written submission, para. 355; Mexico's first written submission, para. 354; United States' response to Panel question No. 10 following the first substantive meeting, para 15; European Union's response to Panel question No. 10 following the first substantive meeting; Mexico's response to Panel question No. 10 following the first substantive meeting.

1436. See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit JE-126.

between the member companies". Article 14 indicates that the CCCMC may impose sanctions against exporters that fail to comply with the Charter or coordination programs.

7.1010 Article 3 of the *2001 CCCMC Charter* specifies that the CCCMC is to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals industries". Article 6 of the *2001 CCCMC Charter* does not refer to export price coordination; however, Article 6(3) provides that the CCCMC shall "promote the industry's self-discipline", including adopting "sanction measures against breaching companies.[1437]

7.1011 Although the *1994 CCCMC Charter* indicates that the CCCMC is responsible for coordinating industry export prices, the *2001 CCCMC Charter* does not clearly indicate that the CCCMC retains such responsibility. China argues that the *2001 CCCMC Charter* fully replaced the *1994 CCCMC Charter*. The complainants disagree, and suggest there is evidence that exporters were required to follow industry export prices even after 2001.[1438]

1437. Article 6 of the *2001 CCCMC Charter* instead refers to the need to "coordinate and direct import and export trade activities", "promote the industry's self-discipline", and "[o]rganize members in responding to allegations launched by foreign countries against China for dumping, subsidies and protective measures related to metal, mineral and chemical products" (Exhibit JE-87).

1438. Evidence includes price data for bauxite and yellow phosphorus and screenshots of CCCMC website pages. See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's

7.1012 China argues that the *2010 CCCMC Charter* formally replaces both the *1994* and *2001 CCCMC Charters*, and in no way authorizes the CCCMC to regulate industry price coordination.[1439]

7.1013 In addition, China argues that it effectively abandoned price coordination on 9 January 2008[1440], which was later formalized on 26 May 2008 through issuance of the *2008 PVC Notice*.[1441] Moreover, China argues that in a 2010 Resolution[1442] it abolished all aspects of the export coordination system.

7.1014 The *2010 CCCMC Charter* and *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* discussed above entered into force following the date of the Panel's establishment. As explained in paragraph 7.33 au-dessus, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.[1443]

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first written submission, para. 394; Exhibit JE-126l; *CCCMC Export Coordination Measures*, Articles 3, 5 (Exhibit JE-107); CCCMC Brochure, at 14 (Exhibit JE-89); CCCMC Website Pages, at 3-5 (Exhibit JE-188).

1439. China's second written submission, paras. 562, 574.

1440. *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

1441. *2008 PVC Notice* (Exhibits CHN-2, JE-125).

1442. *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

1443. The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

At the request of the complainants[1444], the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures.[1445] Accordingly, the Panel will not consider the *2010 CCCMC Charter* or *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* in its assessment.

7.1015 A notice or resolution stating that China's Customs authorities will no longer enforce the PVC procedure does not determine whether the CCCMC is nevertheless authorized to coordinate export prices. The PVC procedure is limited to enforcing a coordinated price at the border. In addition, the PVC procedure was only employed for one of the products at issue – yellow phosphorus. The Panel will therefore evaluate whether the measures at issue authorized the CCCMC to coordinate export prices, independently of whether the PVC procedure remained in operation.

7.1016 There is no evidence on the face of the *2001 CCCMC Charter* to indicate that it would replace in full the *1994 CCCMC Charter* version. Notwithstanding, it is plausible that a subsequent version of a Charter would replace or supersede a prior version in its entirety, unless

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1444. See United States' and Mexico's responses to Panel question No. 2 following the first substantive meeting and to Panel question No. 1 following the second substantive meeting.

1445. In any event, the *2010 CCCMC Charter* and *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* appear to have a different "essence" than the *2001 CCCMC Charter* that was in place at the time of the Panel's establishment because they appear to remove all authority from the CCCMC to coordinate export prices.

a successive version were to plainly indicate that were not the case. China submits that a resolution of 21 February 2001 confirms that the 2001 Charter replaced the 1994 one.[1446] In addition, Article 16 of the 2001 Charter indicates that the General Assembly of Member Representatives of the CCCMC may draw up or amend the Organization's Charter. Each Charter is in its own right a complete document containing general provisions, description of the CCCMC's functions, members, organization, branches, and finances.[1447] The Panel considers that the two Charters did not remain in force simultaneously. Accordingly, the Panel concludes that the *2001 CCCMC Charter* alone was in force at the time of the Panel's establishment.

7.1017 Despite no express reference to export price coordination in the *2001 CCCMC Charter*, the reference to "coordinat[ion]" of "export trade activities" is broad enough to encompass price coordination. In the Panel's view, evidence confirms that under the *2001 CCCMC Charter*, the CCCMC was indeed authorized to coordinate export prices, at least until 2010 when China issued a Notice and MOFCOM orders to formally repeal the various elements of China's system of coordinating export prices.

7.1018 Additional Chinese instruments identified by the complainants in their first written submissions confirm that the CCCMC was directed to coordinate export prices

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1446. China's response to Panel question No. 69 following the second substantive meeting paras 341-343; See Letter by the China CCCMC, 3 December 2010.

1447. Exhibit JE-86, JE-87.

through a system of self-discipline. These measures are not within the Panel's terms of reference; however, the Panel explained that it may nevertheless consider these instruments as evidence in assessing the operation of China's alleged MEP requirement.

7.1019 Article 2 of the *CCCMC Export Coordination Measures* identifies "self discipline" as an objective of "coordination". Article 4(3) specifically indicates that the CCCMC's "coordination content" shall include "export price". Article 18 indicates that "[c]oordination programs examined, passed and recorded in democratic discussion are collective contracts, and all member companies must fully implement them". Article 19 provides that member companies must provide business statistics or other materials in regard to their exportation, in order "[t]o facilitate supervision and guidance with the implementation of coordination programs". Article 20 states that "[c]oordination organizations for a particular commodity shall regularly inspect the implementation of the Particular Commodity Coordination Management Measures and coordination programs mainly by selfchecking".

7.1020 Article 1 of the *Bauxite Branch Coordination Measures* states that "coordination" shall contribute to "self-discipline". Article 4 specifies that the Branch "shall examine and determine the industry coordinated export prices for bauxite exports", including "once every semester" generally, or at other times "in case of relatively significant price fluctuations on the international markets". Article 7 indicates that industry coordinated export prices should be, inter alia "sent to the license

issuing bodies as a basis for license issuance". Article 10 provides that the coordinated export price is "equivalent to a collective economic contract" and that "each and every company must implement it strictly".

7.1021 Article 8 of the *CCCMC Bauxite Branch Charter* refers to the need to "promote the industry's self-discipline". Article 20(3) provides for disciplinary measures against members that "[f]ail to implement industry coordination". Article 45 indicates that the Bauxite Branch may levy fines to "supervise the implementation of the industry's self-disciplined coordination".

7.1022 China indicates that the *CCCMC Export Coordination Measures* and *CCCMC Bauxite Branch Coordination Measures* were "declared inapplicable" through a 9 January 2008 *Notice*[1448], but states that these measures were repealed by resolution only on 28 July 2010.[1449]

7.1023 The complainants do not provide evidence of price coordination managed by other raw material-specific branches; however, the *CCCMC Export Coordination Measures* and the CCCMC Brochure and identified CCCMC website pages confirm that commodity coordination branches exist for the raw materials at issue.[1450]

1448. *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

1449. *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

1450. See *CCCMC Export Coordination Measures*, Articles 3, 5 (Exhibit JE-107); CCCMC Brochure, p. 14 (Exhibit JE-89);

7.1024 In the Panel's view, the above *CCCMC Export Coordination Measures* and CCCMC *Bauxite Branch Coordination Measures*, as well as CCCMC Brochure and identified CCCMC website, confirm that the CCCMC was authorized to direct and coordinate industry export prices, including during the period between 2001 until 2010. Thus, the Panel concludes that the broad language in the *2001 CCCMC Charter* authorises such coordination for commodity branches overseen by the CCCMC.

7.1025 In the Panel's view, China has not provided evidence to convince the Panel that the practice of coordinating industry prices was formally removed "from the books" in 2008 or any other time before the Panel's establishment on 21 December 2009. The Panel notes in particular China's distinction between points in time in which measures were "declared inapplicable" in comparison to when those measures were formally "repealed". The Panel notes however that China's has only confirmed the formal repeal of measures authorizing the coordination of export prices in 2010, via the 28 July 2010 Resolution discussed above.[1451]

7.1026 Accordingly, the Panel finds that, at least until 28 July 2010, the *2001 CCCMC Charter*, when interpreted in light of available evidence, directed the CCCMC to set and coordinate export prices for all branches under its authority, including for all the raw materials identified in connection with the complainants' claims, namely bauxite,

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CCCMC Website Pages 3-5 (Exhibit JE-188).

1451. *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc. In light of this finding, the Panel considers it unnecessary to consider price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.[1452]

(ii) Whether China enforces an MEP requirement through penalties imposed on exporters and licensing entities and the use of the PVC procedure

7.1027 The complainants submit that China requires exporters to adhere to coordinated export prices through: (i) penalties imposed on exporters that fail to set prices in accordance with the coordinated export prices; (ii) penalties imposed on licensing entities that issue licences to non-complying exporters; and (iii) application of the PVC export clearance process. The Panel considers these three aspects below.

Penalties on exporters

7.1028 The complainants argue that the (1) *Export Price Penalties Regulations*[1453]; (2) *CCCMC Export Coordination Measures*[1454], (3) *CCCMC Bauxite Branch*

1452. See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit JE-126.

1453. Articles 3, 4, 6 and 9 (Exhibit JE-113).

1454. Article 4(3) (Exhibit JE-107).

Coordination Measures[1455]; and (4) statements by China's MOFCOM, including reference to the existence of a "system of self-discipline"[1456] and the existence of a "collective contract"[1457] establish that China imposes penalties on exporters that fail to set prices in accordance with the coordinated export prices. Alleged penalties imposed on exporters include warnings, suspension of membership or expulsion from the CCCMC, criticism, fines or revocation of exporting rights.[1458] Only the *Export Price Penalties Regulations* are within the Panel's terms of reference.

7.1029 Article 4 of the *Export Price Penalties Regulations* indicates that "all export enterprises shall ... set export prices which are suitable in countries to which the goods are exported". Article 3 indicates that MOFTEC may punish the enterprises that export at "lower-than-normal price". Finally, Article 6 identifies applicable penalties that include notices of criticism, fines of more than 60% of income gained from lower-than-normal price exports, suspension or revocation of bidding or export rights for the enterprise, and fuil "economic responsibility". This

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1455. Articles 7, 8 and 10 (Exhibit JE-108).

1456. See, in particular, MOFCOM Statement *In re Vitamin C Antitrust Litigation* (August 31, 2009), para. 3 (Exhibit JE-111).

1457. See *CCCMC Export Coordination Measures*, Article 21 (Exhibit JE-107).

1458. United States' first written submission, paras. 352-354; European Union's first written submission, para. 356-358; Mexico's first written submission, paras. 355-357.

measure was repealed by order on 12 September 2010.[1459] Article 9 authorizes MOFCOM or the relevant authority to investigate export enterprises suspected of exporting at a lower-than-normal price.

7.1030 As explained in paragraphs 7.33 au-dessus, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.[1460] At the request of the complainants[1461], the Panel will only assess the WTO consistency of the 2009 measures while taking note of 2010 measures.[1462] Thus, for purposes of its assessment of the complainants' claims, the Panel will assess the effect of the *Export Price Penalties Regulations* before its repeal by order on 12 September 2010.

7.1031 The language of the *Export Price Penalties Regulations* is unequivocal in providing a legal basis to impose penalties against enterprises that do not

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1459. *Order No. 2 of 2010 of MOFCOM*, 12 September 2010 (Exhibit CHN-448).

1460. The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

1461. See United States' and Mexico's responses to Panel question No. 2 following the first substantive meeting and to Panel question No. 1 following the second substantive meeting.

1462. In any event, the repeal by order on 12 September 2010 appears to have a different "essence" than the 1996 Export Price Penalties Regulations that was in place at the time of the Panel's establishment because it removes the authority to impose penalties on exporters that fail to set prices in accordance with the coordinated export prices.

conform to coordinated export prices. China has not provided evidence to convince the Panel that the practice of imposing penalties on exporters that fail to set prices in accordance with the coordinated export prices was formally removed "from the books" before the Panel's establishment on 21 December 2009. China may in fact have ceased to impose such penalties on exporters on 28 May 2008, at the time it asserts that the PVC procedure was repealed. However, China has only provided evidence of the formal repeal of this provision in 2010 after the Panel's establishment.

7.1032 Additional instruments identified by the complainants – though ruled outside the Panel's terms of reference – confirm that export enterprises would be subject to penalties for failing to conform to coordinated export prices. As explained, these instruments are not within the Panel's terms of reference; however, the Panel explained that it may nevertheless consider these instruments as evidence in assessing the operation of China's alleged MEP requirement.

7.1033 Article 21 of the *CCCMC Export Coordination Measures* indicates that enterprises that follow "coordination programs" will be "honor[ed]" with requests to increase export quotas for that company. In contrast, member companies that do not comply are to be "criticized, warned, ordered to suspend or withdraw their membership, and economically punished according to the damage they have caused", or have their quotas reduced, licences declined, and export rights withdrawn. As pertains to bauxite specifically, Article 8 of the *CCCMC Bauxite Branch Coordination Measures* addresses

sanctions imposed on enterprises in breach, including fines and cancellation of foreign trade operating rights, bidding rights, tax refunds, and financial support. Article 10 of the *CCCMC Bauxite Branch Coordination Measures* provides that coordination of prices is "equivalent to a collective economic contract", and enterprises are "not allowed to act on the basis of [their] individual initiative".

7.1034 As noted in paragraph 7.1022, China has not provided evidence to convince the Panel that the *CCCMC Export Coordination Measures* were formally "repealed" before the Panel's establishment on 21 December 2009. While the complainants do not provide evidence of price coordination managed by other raw material-specific branches, as discussed in paragraph 7.1023, the *CCCMC Export Coordination Measures* and the CCCMC Brochure and identified CCCMC website pages confirm that commodity coordination branches exist for the raw materials at issue.

7.1035 In addition to these measures, the complainants have also referred to statements made by China's MOFCOM in the context of antitrust litigation in the United States.[1463] These statements were made in connection with events taking place prior to 2008, but nevertheless refer to the existence of a "system of self-discipline" and reveal that further parties would be subject to penalties for failure to participate in price coordination.

7.1036 For the foregoing reasons, the Panel concludes that, through the *Export Price Penalties Regulations*, China had in place a system of penalties imposed on

1463. See, in particular, Exhibit JE-111.

exporters that failed to set prices in accordance with the coordinated export prices at least until 12 September 2010.

Penalties on export licence issuing authorities

7.1037 The complainants argue that the *Measures for Administration of Licensing Entities*[1464] and *CCCMC Bauxite Branch Coordination Measures*[1465] establish that China imposes penalties on licensing entities that issue licences to non-complying exporters. Alleged penalties against licensing entities include circulation of a notice of criticism, suspension of the licence-issuing authority, or termination of this authority.[1466] Only the *Measures for Administration of Licensing Entities* are within the Panel's terms of reference.

7.1038 Article 40(3) of the *Measures for Administration of Licensing Entities* indicates that punishment shall be imposed on licensing authorities for "issuing licenses without following the coordinated export prices". Under Article 41, punishment includes public condemnation, and suspension or cancellation of the right to issue licences.

7.1039 China submits that this measure was repealed by the *2004 Export Licence Administration Measures* [1467],

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1464. Article 40(3), 41 (Exhibits CHN-358, JE-75).

1465. Articles 7, 8 and 10 (Exhibit JE-108).

1466. United States' first written submission, paras. 352-355; European Union's first written submission, para. 356-359; Mexico's first written submission, para. 355-358; Complainants' response to Panel question No. 13 following the first substantive meeting.

1467. Exhibit CHN-360.

which was in turn repealed by the 2008 Measures for the Administration of License for the Export of Goods.[1468] China submits that these latter two measures set out general rules on the administration of export licences. For purposes of legal certainty, China submits that Article 40(3) of the *Measures for Administration of Licensing Entities* was removed by a 12 September 2010 decision of the Ministry of Commerce.[1469]

7.1040 As explained in paragraphs 7.33 au-dessus, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.[1470] At the request of the complainants[1471], the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures.[1472] Thus, for purposes of its assessment

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1468. Exhibit CHN-342.

1469. *2010 Amendment of Measures for Administration of Licensing Entities* (Exhibit CHN-449).

1470. The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

1471. See United States' and Mexico's responses to Panel question No. 2 following the first substantive meeting and to Panel question No. 1 following the second substantive meeting.

1472. In any event, the 2010 Ministry of Commerce decision appears to have a different "essence" than the *Measures for Administration of Licensing Entities* that was in place at the time of the Panel's establishment because it removes the authority to impose penalties on licensing entities that issue licences to non-complying exporters.

of the complainants' claims, the Panel will assess the effect of the *Measures for Administration of Licensing Entities*, or any potential superseding measures, that were effective at the date of the Panel's establishment on 21 December 2009, before the issuance of the 2010 Ministry of Commerce decision.

7.1041 In the Panel's assessment, the content of both the *2004 Export Licence Administration Measures* and *2008 Export Licence Administration Measures* is not identical to that of the *Measures for Administration of Licensing Entities*.[1473] Notably, as the complainants point out[1474], the 2004 and 2008 measures address the "Administration of *Licenses*" and contain rules and requirements governing the issuance of export licences, whereas the 1999 measure at issue addresses the "Administration of the *Organs* for Issuing the Licenses", concerning activities and conduct of China's import and export licensing entities. It is thus unclear whether these latter measures are full replacement measures for the 1999 measure at issue, that is, whether they supersede all aspects of the 1999 measure at issue. Furthermore, there is no express reference on the face of the 2004 or 2008 measures to indicate that they supersede or replace the *Measures for Administration of Licensing Entities*. This stands in contrast to the 2008 Measures for the Administration of License for the Export of Goods, which states that it amends the "Measures for

1473. It should be noted that the content of the *2004 Export Licence Administration Measures* and *2008 Export Licence Administration Measures* is highly similar.

1474. United States' second written submission, para. 463; European Union's second written submission, para. 172; Mexico's second written submission, para. 467.

the Administration of License for the Export of Goods", the same title given to the 2004 version of that measure.

7.1042 Finally, China has stated that it "abandoned" price coordination on 26 May 2008.[1475] In a 2010 decision of the Ministry of Commerce, China removed specific language in Article 40(3) of the 1999 Measures for Administration of Licensing Entities.

7.1043 Accordingly, for the foregoing reasons, the Panel concludes that the 1999 *Measures for Administration of Licensing Entities* were not replaced by either the *2004 Export Licence Administration Measures* or *2008 Export Licence Administration Measures*. As a consequence, the Panel has no evidence that the *Measures for Administration of Licensing Entities* was not valid at the time of the Panel's establishment on 21 December 2009.

7.1044 The complainants have also identified the *CCCMC Bauxite Branch Coordination Measures* as relevant. As discussed above, China indicates that the *CCCMC Bauxite Branch Coordination Measures* were repealed by resolution only on 28 July 2010.[1476] Prior to that date, China argues that this measure was declared inapplicable"

1475. China's first written submission, para. 838; China's response to Panel question No. 1 following the first substantive meeting, para. 20.

1476. *Resolution of the Fifth Standing Committee of the CCCMC on Abolishing Certain Documents Including Measures of the CCCMC on the Coordination and Administration of Export Commodities*, 28 July 2010 (Exhibit CHN-4).

through a 9 January 2008 Notice.[1477] Accordingly, the Panel considers this measure was "on the books" at the date of the Panel's establishment.[1478] As pertains to bauxite specifically, Article 7 of the *CCCMC Bauxite Branch Coordination Measures* provides that industry coordinated export prices shall be notified to licence issuing bodies "as a basis for license issuance". Although this measure is outside the Panel's terms of reference, this measure confirms that the granting of an export licence is conditioned on conformity with industry coordinated export prices.

7.1045 The complainants do not provide evidence of price coordination managed by other raw material-specific branches; however, the *CCCMC Export Coordination Measures* and the CCCMC Brochure (discussed above) and identified CCCMC website pages confirm that commodity coordination branches exist for the raw materials at issue.

7.1046 In light of the above, the Panel concludes that, at the time of establishment of the Panel on 21 December 2009 and at least until 12 September 2010, China, through the *Measures for Administration of Licensing Entities*, had in place a system that imposed penalties on licensing entities that issue licences to exporters that did not follow the coordinated export prices.

1477. *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

1478. See the Panel's discussion in paragraphs 7.1022 to 7.1026 above.

Application of the PVC export clearance process to exporters of yellow phosphorus

7.1047 The complainants argue that (1) *China's Customs Law*[1479]; (2) the *2002 PVC Notice*[1480]; (3) the *2004 PVC Notice*[1481]; (4) the *2008 PVC Notice*[1482]; (5) *Online PVC Instructions*[1483]; (6) a screenshot of the CCCMC online PVC interface, dated 28 May 2008[1484]; (7) the *CCCMC PVC Rules*[1485]; (8) *Notice of the Rules on Price Reviews of Export Products by the Customs (Customs Export Price Review Rules)*[1486]; (9) *Rules for Coordination with Respect to Customs Price Review of Export Products (Customs*

1479. Articles 2, 9 and 23 (Exhibit JE-68).

1480. Exhibit JE-121, Article 4.

1481. Paras. 2, 4 (Exhibits CHN-364, JE-122).

1482. *2008 PVC Notice* (Exhibits CHN-2 JE-125).

1483. Exhibit JE-123, Sections 1, 4, 9(2).

1484. Exhibit JE-124, at pages 1-2 and 3-4.

1485. Exhibit JE-127, Annex 3.

1486. This measure was not submitted to the Panel. See United States' first written submission, para. 222. China submits that the *1997 Customs Export Price Review Rules* contains two annexes, which include additional measures referred to by the complainants: the *Customs Export Price Review Coordinating Rules* and *Provisional Rules on Export PVC*. China argues that *1997 Customs Export Price Review Rules* was superseded by the *2003 PVC Notice* and formally repealed on 26 May 2008 when China "abandoned" export price verification. See China's first written submission, para. 849. China submits that the *2010 Abolition of Price Review of Export Commodities* confirms this repeal. See Exhibit CHN-434.

Export Price Review Coordinating Rules)[1487]; and (10) *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review* (Provisional *Rules on Export PVC*)[1488] establish that China requires exporters to conform to coordinated export prices through application of the PVC export clearance process to exports of yellow phosphorus.[1489]

7.1048 Based on the *Customs Export Price Review Rules*, the *Customs Export Price Review Coordinating Rules*, and the *Provisional Rules on Export PVC*, and references in the *2002 PVC Notice* and *2004 PVC Notice*, the complainants submit that the exportation of yellow phosphorus is subject to price review by China's Customs as part of the export clearance process.

7.1049 The *CCCMC PVC Rules* direct the CCCMC to verify the export price of an export contract and affix a PVC chop (seal or stamp) to a PVC form and the contract where the price complies with the coordinated export price.[1490] The exporter must then declare the export contract to Customs for clearance.[1491] Customs may deny

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1487. This measure was not submitted to the Panel. See United States' first written submission, para. 222.

1488. This measure was not submitted to the Panel. See United States' first written submission, para. 222.

1489. The complainants do not allege that the PVC procedure is applicable to any of the other raw materials identified by the complainants with respect to their MEP-related claims.

1490. Exhibit JE-127, Annex 3.

1491. *2004 PVC Notice*, para. 4 (Exhibit JE-122).

any contract that does not bear the CCCMC PVC chop.[1492] Penalties may also be imposed against exporters that forge PVC chops.[1493] Exporters of yellow phosphorus may submit contract information electronically for verification.[1494] Online instructions indicate that a contract will only pass "price-review" if "the contract price less the transportation fee is greater or equal to the coordinated price".[1495]

7.1050 The complainants submit that the *CCCMC PVC Rules*, *Online PVC Instructions*, *Customs Export Price Review Rules*, *the Customs Export Price Review Coordinating Rules*, and the *Provisional Rules on Export PVC*, in particular, continued to be available and effective after 26 May 2008, and thereby maintained in place the PVC export clearance process.[1496] The complainants submit that price data and screenshots of online web pages from 2008 confirm that China continued to apply the PVC export clearance process to exporters of yellow phosphorus, even after the apparent repeal of the PVC procedure on 26 May

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1492. *2004 PVC Notice*, para. 2 (Exhibit JE-122).

1493. *2004 PVC Notice*, para. 4 (Exhibit JE-122).

1494. See *Online PVC Instructions* (Exhibit JE-123), Sections 1, 4.

1495. *Online PVC Instructions* (Exhibit JE-123), Section 9(2).

1496. United States' first written submission, para. 361; European Union's first written submission, paras. 365; Mexico's first written submission, para. 364.

2008.[1497] The complainants submit that a computer screen snapshot for an exporter submitting contract information for CCCMC verification and chop dated 2008 reveals an industry coordinated price of US$8000 per metric tonne FOB for yellow phosphorus.[1498] The complainants contend that a note on this form indicates that the contract will be approved in cases where the contract price is more than or equivalent to the coordinated price.[1499] In addition, the complainants argue that a 15 October 2009 screenshot shows that CCCMC measures implementing the PVC procedure, including the *CCCMC PVC Rules*, and Online Verifications and Certification Operating Steps, remained available on the CCCMC website after the alleged repeal of the PVC procedure.[1500]

7.1051 China disputes that any measures were in effect after 26 May 2008 that authorized application of the

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1497. United States' first written submission, paras. 357, 360; European Union's first written submission, paras. 361, 364; Mexico's first written submission, paras. 360, 363; United States' second written submission, paras. 448, 450; European Union's second written submission, para. 172; Mexico's first written submission, paras. 365, 368; CCCMC PVC Online Input Screen Shots (May 2008), at pages 1-4 (Exhibit JE-124); Screenshot capture, Exhibit JE-127.

1498. CCCMC PVC Online Input Screen Shots (May 2008), at pages 1-4 (Exhibit JE-124).

1499. United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229.

1500. United States' first written submission, para. 227; European Union's first written submission, paras. 231; Mexico's first written submission, para. 230; Exhibit JE-127.

PVC export clearance. China considers the fact that the *CCCMC PVC Rules* and the *CCCMC Online PVC Instructions* may have been found on the CCCMC website on 28 May 2008 or 15 October 2009 does not establish that the PVC procedure continued in use after the repeal of measures establishing the PVC system.[1501] China argues that the lack of any requirement or reference to the PVC procedure in the 2008-2010 Customs Handbook confirms that the PVC procedure was Discontinued.[1502] Regardless, China argues that the PVC system in China was confirmed to be repealed in its entirety by a 2010 Circular.[1503]

7.1052 Finally, China argues that price data submitted by the complainants for yellow phosphorus does not demonstrate that prices were coordinated to prevent or restrict exportation. Contrary to the complainants' assertions that a coordinated price of US$8000 per metric tonne FOB for yellow phosphorus in May 2008, China submits that export prices were permitted below US$8000 per metric tonne FOB in May 2008.[1504]

7.1053 The complainants dispute China's conclusion on price data for yellow phosphorus. The complainants submit that the price of yellow phosphorus "uniformly surged" in

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1501. China's first written submission, para. 839.

1502. China's first written submission, paras. 843.

1503. *2010 Circular of the Ministry of Commerce and the General Administration of Customs on Abolishing Two Documents Regarding Price Review of Export Commodities by Customs*, 16 August 2010 (Exhibit CHN-434).

1504. China's first written submission, para. 851, Exhibits CHN-361, CHN-362.

the United States and Europe, and stayed above the level of US$8000 per metric tonne FOB "beginning soon after the end of May in June 2008" until November 2008. The complainants add that prices of yellow phosphorus exports to the United States were "almost identical" to those to the European Union during that timeframe.[1505] Thus, the complainants argue that China's presentation of data showing that the prices fell below US$8000 per metric tonne FOB in 2007 and early 2008, but not after May 2008, does not rebut their allegation that China imposed an MEP requirement for yellow phosphorus. Moreover, they submit that exports of yellow phosphorus below US$8000 per metric tonne in early May 2008 accounted for 2.8% of exports for that month, and that overall, only 2.5% of yellow phosphorus exports throughout 2008 fell below US$8000 per metric tonne FOB.[1506]

7.1054 The Panel determined in its 1 October 2010 preliminary ruling that all of the measures identified in connection with the PVC procedure were outside the Panel's terms of reference. Therefore the Panel will not reach findings on these measures. To the extent the Panel were to consider these measures in its analysis, those measures in place at the time of the Panel's establishment would be relevant. As explained in paragraphs XX above, in general, only measures that were in force when the

1505. United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394.

1506. United States' second written submission, para. 394; European Union's second written submission, para. 172; Mexico's first written submission, para. 397.

Panel was established on 21 December 2009 form the basis of its terms of reference.[1507] The *2010 Circular*[1508] retroactively confirms the repeal of the PVC procedure in 26 May 2008. However, the complainants have alleged that China in fact imposed the PVC customs clearance procedure between 26 May 2008 and issuance of the 2010 Circular.

7.1055 Articles 9 and 23 of China's *Customs Law* provide that all goods for exportation must be approved by China's customs authorities. In this context, the *2002 PVC Notice* and *2004 PVC Notice* confirm that 35 products, including yellow phosphorus are subject to the PVC procedure. Its second and fourth paragraphs indicate that products may not be exported that do not bear the CCCMC "chop" or seal. Appendix 2 of the *2004 PVC Notice* confirms that exports will be rejected that do not conform to MOFCOM and GAC rules. The *CCCMC PVC Rules* and *Online Verification and Certification Operating Steps* in its step 9, further confirm the designation of commodity branches and the use of coordinated export prices and a mineral and chemical commodity pre-verification and chop system for certain products, including yellow phosphorus.

7.1056 The complainants acknowledge that the *2004 PVC Notice* superseded the *2002 PVC Notice*, and that the *2008 PVC Notice* repealed the *2004 PVC Notice* on 26

1507. The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

1508. *2010 Abolition of Price Review of Export Commodities* (Exhibit CHN-434).

May 2008.[1509] However, the complainants allege that the *Customs Export Price Review Rules*, *Customs Export Price Review Coordinating Rules* and *Provisional Rules on Export PVC* continued to be effective after this date.[1510]

7.1057 The 2008 PVC Notice unequivocally repeals the *2004 PVC Notice* on 26 May 2008.[1511] The Panel has no evidence that the *Customs Export Price Review Rules*, *Customs Export Price Review Coordinating Rules* and *Provisional Rules on Export PVC* continued to be in force after this date. Accordingly, the Panel has no basis to conclude that the PVC procedure continued in effect, as the complainants allege, on the face of the Chinese instruments before the Panel.

7.1058 The complainants refer in particular to a webpage screenshot of the CCCMC online PVC interface, dated 28 May 2008, and a screenshot of *CCCMC PVC Rules* and *Online PVC instructions*, dated 15 October 2009, in arguing that the PVC procedure continued to be employed by China's customs officials even after the apparent repeal of the PVC procedure on 26 May 2008.

1509. United States' first written submission, para. 360; Exhibit JE-125; Exhibit CHN-2.

1510. United States' first written submission, para. 361; European Union's first written submission, para. 365; Mexico's first written submission, para. 364.

1511. Exhibit CHN-125, stating "it is decided to repeal the MOFCOM and General Administration of Customs Communication No. 36 of the year 2003 [the *2004 PVC Notice*]. The present communications takes effect on the day it is published."

7.1059 The Panel notes that the screenshot of the CCCMC online PVC interface was taken two days after the repeal of the 2004 PVC Notice. In addition, the Panel is hesitant to conclude that the PVC procedure continued in effect solely on the basis of screenshots of *CCCMC PVC Rules* and *Online PVC instructions* taken on 15 October 2009. In the Panel's view, the failure to update a website, does not on its own provide evidence to make conclusions contrary to the express language of the 2008 PVC Notice that the PVC would no longer be applied to exports of subject goods, including yellow phosphorus. In addition, as noted by China, the complainants have not even submitted a screenshot of the CCCMC website closer to the date of the Panel's establishment on 21 December 2009 in support of their argument that the PVC was effective at the time of the Panel's establishment despite the apparent formal repeal of the PVC procedure.[1512]

7.1060 Finally, the complainants submit that an analysis of price data for exports of yellow phosphorus in May 2008 and beyond confirms that China had in place a coordinated price for yellow phosphorus after the alleged formal repeal of the PVC procedure, and enforced this price at the time of customs clearance through the PVC procedure. Evidence provided by the complainants[1513] and China[1514] shows an increase in the export price of yellow phosphorus beginning in May 2008, for example, from prices below US$3 per kg during May 2008 and prior

1512. China's first written submission, para. 60.

1513. Exhibit JE-173.

1514. Exhibits CHN-361 and CHN-362.

months to prices above US$5 per kg from June 2008 until November 2008.[1515] This appears to be confirmed by Exhibit JE-173.

7.1061 In the Panel's view, the mere submission of price data for yellow phosphorus alone is insufficient to conclude the existence of a coordinated price for yellow phosphorus, and by extension, that a coordinated price was enforced through application of the PVC procedure. The Panel concluded above that the PVC procedure was formally repealed on 26 May 2008, upon publication of the *2008 PVC Notice*. Price increases or conformity of export prices to the United States, European Union and other destinations may result from a multitude of market factors. The Panel cannot draw the conclusion that an increase or trends in export prices alone support the conclusion that China enforced an MEP requirement for yellow phosphorus through the PVC, in the face of evidence that this procedure was repealed.

7.1062 Based on the foregoing reasons, it appears that China did not formally have in place or otherwise maintain a PVC customs clearance procedure on exporters of yellow phosphorus at the time of the Panel's establishment on 21 December 2009.

(c) Conclusions on whether China imposes an MEP requirement on exporters of bauxite coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc

7.1063 The Panel concludes above that the *2001 CCCMC Charter*, interpreted in light of the *CCCMC Export*

1515. Exhibit CHN-362.

Coordination Measures, *CCCMC Bauxite Branch Coordination Measures*, CCCMC Brochure and identified CCCMC website pages, authorized the CCCMC to set and coordinate export prices for all branches under its authority, including for all the raw materials identified in connection with the complainants' claims, namely bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc. The Panel further concludes that, at the time of the Panel's establishment on 21 December 2009, China through the *1996 Export Price Penalties Regulations* imposed penalties on exporters that fail to set prices in accordance with the coordinated export prices. In addition, the Panel concludes that, under the *Measures for Administration of Licensing Entities*, China imposed penalties on licensing entities that issued licences to exporters that did not follow the coordinated export prices.

7.1064 In light of these conclusions, the Panel additionally finds that the authority to coordinate export prices and enforce these prices through the imposition of penalties on exporting enterprises, or on export licensing entities that issue licences to exporters that do not follow the coordinated export prices, amounts to a requirement to coordinate export prices for the raw materials at issue. The requirement derives from the fact that failure to comply with the coordinated price will result in punishment that rises to a level to prevent an enterprise from exporting altogether. In addition, under the measures at issue, export licensing entities may be punished for failing to enforce a given coordinated price. The measures do not permit exporting enterprises to deviate from coordinated export prices, or otherwise grant discretion to export

licensing agencies to make exceptions. Thus, coordinated export prices must be adhered to whenever set by the CCCMC.

7.1065 Finally, the Panel concludes that the complainants failed to establish that China formally had in place or otherwise maintained a PVC customs clearance procedure on exporters of yellow phosphorus at the time of the Panel's establishment on 21 December 2009. The Panel does not consider the absence of this final customs clearance step sufficient to conclude that exporting enterprises are not otherwise required to adhere to coordinated export prices. In addition, only one of the raw materials at issue – yellow phosphorus – was subject to the PVC clearance procedure.

7.1066 Accordingly, the Panel concludes that China, through the measures in the Panel's terms of reference, imposed an MEP requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc at the time of the Panel's establishment. Coordinated export prices were enforced through the imposition of penalties on exporters and licensing entities that failed to conform to coordinated export prices. The Panel finds that this system continued at least until the issuance of a resolution on 28 July 2010.[1516] Having concluded so, the Panel will consider the complainants' claims under Article XI:1, X:1 and X:3(a) of the GATT 1994.

1516. *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

3. Whether a requirement to export at a coordinated minimum export price constitutes a restriction on exportation that is inconsistent with Article XI:1 of the GATT 1994

7.1067 The complainants argue that the requirement to export at a coordinated minimum export price amounts to a restriction that is inconsistent with Article XI:1 of the GATT 1994 because such a requirement prohibits exportation if the price of the export is lower than the floor established by the minimum export price. In the complainants' view, this amounts to a "limiting condition" that is a restriction within the meaning of Article XI:1 of the GATT 1994.[1517] They argue that China's system has an impact on prices and distorts world market conditions for the raw materials at issue because of China's alleged position as a leading producer of these materials.[1518]

7.1068 China argues that Article XI:1 does not broadly prohibit regulation, or any condition imposed on exports or imports *per se*. Rather, China argues that Article XI:1 prohibits WTO Members from imposing a condition on exportation or importation that has a "limiting effect" on the *quantity* of exports or imports. China argues that in determining compliance of an MEP with Article XI:1, the relevant feature of an MEP requirement to consider is the benchmark price used to determine the MEP and

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1517. United States' second written submission, para. 396; European Union's second written submission, para. 172; Mexico's first written submission, para. 399.

1518. Complainants' joint opening oral statement at the first substantive meeting, para. 32.

its relationship to the relevant world trading price for a particular product. Such analysis cannot assume that the MEP requirement is necessarily higher than the market price, such that it would restrict exports; according to China, this must be proved.[1519]

7.1069 The complainants request the Panel to conclude that a requirement to export at a coordinated minimum export price constitutes a restriction on exportation that is inconsistent with Article XI:1 of the GATT 1994.

7.1070 The Panel concluded above that the operation of the measures at issue amounts to a requirement to coordinate export prices. In addition, the Panel concluded that the measures at issue, including those that delegate authority to the CCCMC, are attributable to China and may be subject to WTO dispute settlement. The Panel will consider below whether requirement to export at a coordinated minimum export price constitutes a measure that may be challenged under Article XI:1.

7.1071 Article XI of the GATT 1994 is entitled "General Elimination of Quantitative Restrictions". Article XI:1 provides:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

1519. China's first written submission, para. 860.

7.1072 Thus, Article XI:1 requires the elimination of import and export restrictions or prohibitions made effective through quotas, import or export licences or *other measures*.

7.1073 The GATT panel in *Japan – Semi-Conductors* found that "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to 'measures'. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure."[1520] The panel in *India – Quantitative Restrictions* found that the text of Article XI:1 of the GATT 1994 is "broad" in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges".[1521]

1520. GATT Panel Report, *Japan – Semi-Conductors*, para. 106.

1521. The panel in India – Quantitative Restrictions found:

"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in Japan – Trade in Semi-conductors, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'."

(original footnotes omitted).

7.1074 In line with these views, the Panel concludes that the requirement to export at a coordinated minimum export price, which is operated through a series of measures that are attributable to China, is a type of measure that may be challenged under Article XI:1.[1522] Accordingly, the Panel will next consider whether the alleged MEP requirement is a "prohibition or restriction" on exportation under Article XI:1.

7.1075 The applicability of Article XI:1 to minimum price requirements has been previously addressed by two GATT panels. In *EEC - Minimum Import Prices*, a GATT panel examined a requirement that importers of tomato

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Panel Report, *India – Quantitative Restrictions*, para. 5.128. See also Panel Report, *EC – Poultry*, para. 7.450; Panel Report, *Colombia – Ports of Entry*, para. 7.226.

1522. The Panel considers its conclusion is consistent with the view taken by the GATT panel on *Japan – Semi-Conductors*. The panel in that dispute concluded that a "complex of measures", comprising "an administrative structure" created by the Japanese government amounted to "a coherent system restricting the sale for export of monitored semi-conductors at prices below specific company-specific costs to markets other than the United States, inconsistent with Article XI:1." See GATT Panel Report on *Japan – Semi-Conductors*, paras. 106, 117. The panel concluded that measures including repeated direct requests by the Japanese government, statutory requirements, and price monitoring, among others, operated to "facilitate strong peer pressure to comply with requests by [the Japanese government]." Even in the absence of what it described as "formal legally binding obligations", the panel concluded that the "complex of measures exhibited the rationale as well as the essential elements of a formal system of export control". See para. 117.

concentrates provide additional security to guarantee that the free-at-frontier price plus the customs duty payable would equal or exceed a determined minimum import price. The security would be forfeited in proportion to any quantities imported at a price lower than the minimum price. Subject to an assessment of a possible exemption under Article XI:2(c)(i) and (ii), the panel found that the minimum import price system, as enforced by the additional security, was a restriction "other than duties, taxes or other charges" within the meaning of Article XI:1.[1523]

7.1076 In *Japan – Semi-Conductors*, a GATT panel examined whether measures applied to exports of semi-conductors at prices below company-specific costs constituted a restriction under Article XI:1 of the GATT 1994. The panel expressly referred to the rationale applied in *EEC - Minimum Import Prices* in concluding that a regulation preventing exportation below a minimum price level was a restriction on exportation inconsistent with Article XI:1.[1524]

7.1077 The panel in *India – Quantitative Restrictions* concluded that the scope of the term "restriction" is "broad", and, in terms of its ordinary meaning, is "a

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1523. GATT Panel Report, *EEC – Minimum Import Prices*, para. 4.9.

1524. GATT Panel Report, *Japan – Semi-Conductors*, para. 106. The Panel concluded, that the "complex of measures" amounted to "a coherent system restricting the sale for export of monitored semi-conductors at prices below specific company–specific costs to markets other than the United States, inconsistent with Article XI:1." GATT Panel Report, *Japan – Semi-Conductors*, para. 117.

limitation on action, a limiting condition or regulation."[1525] The panel in *India – Autos* also elaborated on the meaning of the term "restriction":

> "On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both 'prohibition or restriction'. Furthermore, the Panel considers that the expression *'limiting condition'* used by the *India – Quantitative Restrictions* panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e., that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself."[1526]

7.1078 More recently, the panel in the *Colombia – Ports of Entry*, after reviewing several GATT and WTO cases,

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1525. Panel Report, *India – Quantitative Restrictions*, para. 5.128.

1526. Panel Report, *India – Autos*, para. 7.270 (underlining and emphasis original). Several WTO panels have cited with approval the interpretation that the term "restriction" in Article XI:1 refers to the imposition of a "limiting condition": see Panel Report, *Colombia – Ports of Entry*, paras. 7.233-7.234; Panel Report, *Brazil –Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.

concluded that "restrictions" in the sense contemplated by Article XI:1 refers to measures that create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly.[1527] In making an assessment of whether a measure constitutes a restriction, the panel considered it important to look at the design of the measure and its potential to adversely affect importation.[1528]

7.1079 The term "restriction", as discussed by these three panels, aligns with the dictionary definition of the term "restriction", which is "a thing which restricts someone or something, a limitation on action, a limiting condition or regulation".[1529]

7.1080 The Panel concluded above that, through a series of measures at issue, China requires exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked.

7.1081 The Panel agrees with the approach set out in *EEC - Minimum Import Prices* (taken in the case of importation) and followed in *Japan – Semi-Conductors*,

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1527. Panel Report, *Colombia – Ports of Entry*, para. 7.240. The panel in *Argentina – Hides and Leather* recalled that "Article XI:1, like Articles I, II and III of the *GATT 1994*, protects competitive opportunities of imported products not trade flows". See Panel Report, *Argentina – Hides and Leather*, para. 11.20.

1528. Panel Report, *Colombia – Ports of Entry*, para. 7.240, see also Panel Report, *US – Poultry (China)*, para. 7.454.

1529. *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2554.

that a measure preventing exportation below a minimum price level inherently constitutes a "restriction" that is inconsistent with Article XI:1. In the Panel's view, the authority to determine and require exporters to follow a particular export price level and not deviate below it without facing what amounts to a strict penalty, including revocation of the right to export altogether, has the potential to restrict trade. The restriction or limitation on exportation arises from the possibility that a price is set at such a level that exporters cannot find a potential buyer in order to sell their product. Products that would have otherwise been exported would remain in the domestic market as a subsidiary effect of this.[1530] The Panel consider

1530. A requirement to set an export price *above* the price that would otherwise prevail under free trade would have the effect of reducing export volumes. Under this scenario, exporters would be unable to export the same volume of their product for sale at that higher price. Unsold exports would remain in the domestic market that otherwise would have been sold abroad. The reduction in exportation would amount to a limiting effect on exportation with the additional effect of driving down the domestic price of the particular product due to increased domestic supply. Such an outcome would appear to result regardless of whether a particular exporting country has a relatively substantial share of production or a limited share. The only difference to note is the following: if an exporting country controls a substantial or monopoly share of the world export market for a particular product (due to its position as a leading or sole producer of that product), the world price would increase as a result of the imposition of a minimum export price requirement that is set above the trading price that would prevail under free trade. In this case, export volumes would decrease but would not fall to zero. If an exporting country were to control only a small share of the world export market for a particular product, the world price would not be affected by the imposition of a minimum export requirement above the trading price that would prevail under free trade. As a result, exports of that product would fall to zero.

the very *potential* to limit trade is sufficient to constitute a "restriction[] ... on the exportation or sale for export of any product" within the meaning of Article XI:1 of the GATT 1994.[1531] The Panel considers this view is consistent with the conclusion by the panel on *Colombia – Ports of Entry* that any measure that creates uncertainty as to the ability to import/export, and otherwise "compete" in the marketplace, violates Article XI:1.[1532]

7.1082 At the time of the Panel's establishment, the Panel concludes that, under the measures at issue, China required exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked. The Panel concludes that this requirement constitutes a "restriction[] ... on the exportation or sale for export of any prod[illegible] within the meaning of Article XI:1 of the GATT 1994 because this requirement to export at a coordinated minimum export price by its very nature has a limiting or restricting effect on trade.

1531. In other contexts, panels and the Appellate Body have concluded that the *potential* to violate a provision was sufficient to result in inconsistency. Under Article III, for instance, the GATT panel on *EEC – Oilseeds I* examined whether a purchase regulation which did not necessarily discriminate against imported products in all cases but was *capable* of doing so was inconsistent with Article III:4. That panel concluded that the "exposure of a particular imported product to a risk of discrimination" constitutes a form of discrimination sufficient to violate Article III:4. See GATT Panel Report, *EEC – Oilseeds I*, para. 141.

1532. Panel Report, *Colombia – Ports of Entry*, para. 7.240.

4. Whether China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus is inconsistent with China's obligations under Article X:3(a) of the GATT 1994

7.1083 The complainants additionally submit that China acts inconsistently with its obligations under Article X:3(a) of the GATT 1994 by authorizing the CCCMC to participate in the PVC customs clearance procedure in respect of yellow phosphorus. The complainants allege that the CCCMC's involvement permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with those of the exporters.[1533] In their view, this contravenes China's obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in an impartial and reasonable manner under Article X:3(a) of the GATT 1994.[1534]

7.1084 China submitted that it formally repealed the PVC procedure in May 2008 when it "abandoned" price coordination, and therefore requests the Panel to reject the complainants' claims.[1535] China argues that the

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1533. The PVC procedure requires exporters of yellow phosphorus to submit their export contracts and special PVC forms to the CCCMC for verification.

1534. United States' first written submission, para. 364, European Union's first written submission, para. 368; Mexico's first written submission para. 367.

1535. China's first written submission, para. 867.

Panel cannot make recommendations regarding the administration of measures that have ceased to exist.[1536]

7.1085 The Panel recalls from it 1 October 2010 preliminary ruling its finding that all of the measures identified in connection with the PVC procedure were outside the Panel's terms of reference because the complainants' Panel Requests did not identify clearly and specifically the measures under challenge.[1537] Accordingly, the Panel considers it is outside of its mandate to rule on the complainants claims' that China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus is inconsistent with under Article X:3(a).

7.1086 Even if the Panel were to have concluded otherwise, the Panel recalls its conclusion in paragraph 7.1062 above that "China did not formally have in place or otherwise maintain a PVC customs clearance procedure on exporters of yellow phosphorus at the time of the Panel's establishment on 21 December 2009". Accordingly, for this further reason, the Panel considers it would be inappropriate to consider the complainants' claim.

7.1087 Consequently, the Panel does not make findings under Article X.3(a) of the GATT 1994 on whether China is in breach of its obligations in respect of China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus.

1536. China's first written submission, para. 867.

1537. See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

5. Whether China's has failed to publish measures through which China administers its alleged minimum price requirement inconsistently with China's obligations under Article X:1 of the GATT 1994

7.1088 The complainants submit that China has breached its obligations under Article X:1 by failing to publish promptly the: (i) *2001 CCCMC Charter*; (ii) *CCCMC Branch-Specific Coordination Measures*; (iii) *Rules for Coordination with Respect to Customs Price Review of Export Products*; (iv) *Notice of the Rules on Price Reviews of Export Products by the Customs*; and (v) *Provisional Rules on Export PVC*.

7.1089 The Panel recalls from it 1 October 2010 preliminary ruling its finding that only six measures referred to by the complainants in both their consultation requests and Panel Requests would form part of the Panel's terms of reference.[1538] Of the five measures identified in the preceding paragraph, only the *2001 CCCMC Charter* falls within the Panel's terms of reference. Accordingly, the Panel will consider the complainants' claim in respect of this measure only.

7.1090 The complainants submit that the CCCMC Charter is the CCCMC's constitution setting forth the mission, functions, authority, and rules and regulations of the CCCMC. In addition, the complainants submit that China has described the Chamber of Commerce as "the instrumentality through which [MOFCOM] oversees

1538. See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

and regulates the business of importing and exporting [] products in China".[1539] They argue that the *2001 CCCMC Charter* is therefore a law or regulation of general application made effective by a WTO Member pertaining to restrictions on exports, and is subject to the obligations of Article X:1 of the GATT 1994.[1540]

7.1091 China submits that the complainants have not adduced argument and evidence showing that, in terms of Article X:1, the Charter is a "law[], regulation[], judicial decision[] and administration ruling[] of general application", within the meaning of Article X:1.[1541] China asserts that such a determination "must be based primarily on the content and substance of the instrument, and not merely on its form or nomenclature".[1542] China argues that the *2001 CCCMC Charter* does not contain either imperative or authoritative rules of conduct that would bring it within the scope of Article X:1.[1543] Even

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1539. United States' first written submission, para. 208, citing Brief of Amicus Curiae: MOFCOM p. 9 (Exhibit JE-98); United States' response to Panel question No. 67 following the second substantive meeting, para 133; The European Union and Mexico refer to the United States' response to Panel question No. 67 following the second substantive meeting.

1540. Complainants' response to Panel question No. 68 following the second substantive meeting, para. 134.

1541. China's second written submission, para. 580.

1542. China's comments on the complainants' responses to Panel question No. 68 following the second substantive meeting, referring to Panel Report, *EC – IT Products*, para. 7.1023.

1543. China's comments on the complainants' responses to

assuming Article X:1 would apply, China argues that the *2001 CCCMC Charter* was formally replaced by the *2010 CCCMC Charter*. China argues that obliging it to publish an expired measure serves no purpose.[1544]

7.1092 As noted in footnote 1445, the *2010 CCCMC Charter* has a different "essence" than the *2001 Charter* that was in place at the time of the Panel's establishment because it appears to remove all authority from the CCCMC to coordinate export prices. Many of the provisions of the *2010 CCCMC Charter* are similar to those in the *2001 CCCMC Charter*, and in some cases identical. However, in view of the at least one significant difference just noted between the two charters, with regard to the role of the CCCMC, publication of the *2010 CCCMC Charter* cannot constitute publication of the former. Moreover, at the request of the complainants, the Panel will only assess the WTO consistency of the measures in existence on 21 December 2009, in this case the *2001 CCCMC Charter*, while taking note that the *2010 CCCMC Charter* no longer provides for the CCCMC to coordinate export prices. Accordingly, the Panel will not consider the *2010 CCCMC Charter* in addressing whether China failed to publish the *2001 CCCMC Charter* inconsistently with its obligations under Article X:1 of the GATT 1994.

7.1093 Article X:1 of the GATT 1994 provides in relevant part:

Panel question No. 68 following the second substantive meeting, referring to Panel Report, *EC – IT Products*, para. 7.1027.

1544. China's second written submission, para. 582.

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... restrictions or prohibitions on ... exports ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. ..."

7.1094 The complainants in this dispute must thus establish that the relevant measure falls within the scope of "laws, regulations, judicial decisions and administrative rulings of general application made effective by" China that pertains to restrictions or prohibitions on exports; if so, China must promptly publish the minimum export price requirement in such a manner as to enable governments and traders to become acquainted with it.

7.1095 The panel on *EC – Selected Customs Matters* found that "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1 of the GATT 1994 are those "laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application".[1545] The Panel on *EC – IT Products* concluded that the phrase "laws, regulations, judicial decisions and administrative rulings" "reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders."[1546] In *US – Underwear*, the Panel explained that an administrative order was of "general application"

1545. Panel Report, *EC – Selected Customs Matters*, para. 7.116.

1546. Panel Report, *EC – IT Products*, para. 7.1026.

"to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers."[1547] The term "made effective" in the context of Article X:1 has so far only been addressed by the panel on *EC – IT Products*. This panel held that the term "made effective" covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally entered into force.[1548]

7.1096 The Panel recalls its earlier conclusion at paragraph 7.1006 above that the *2001 CCCMC Charter* is a measure attributable to China and thus is a measure that can be challenged under the WTO dispute settlement proceedings. In reaching this conclusion, the Panel noted China's acknowledgement that it delegated certain implementing authority to the CCCMC to coordinate export prices. This is reflected in statements made by China's MOFCOM in the context of US domestic court proceedings prior to this dispute. For this reason, the Panel considered that actions undertaken by the CCCMC with respect to minimum export price requirements at issue in this dispute are attributable to China.

7.1097 Thus, the *2001 CCCMC Charter* grants authority to the CCCMC and sets out the functions, structure and operation of the CCCMC. In particular it directs the CCCMC to "provide[] coordination, guidance and consultation services", including to "[d]isseminate and implement[] the state's foreign trade laws, regulations,

1547. Panel Report, *US – Underwear*, para. 7.65.

1548. Panel Report, *EC – IT Products*, para. 7.1047.

guidelines, and policies" and "coordinate and direct import and export trade activities by business within the industries".[1549] The scope of authority is further indicated in the description of the Charter's overall objectives, which include to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals Industries".[1550]

7.1098 In the Panel's view, China's statement of the authority vested in the CCCMC, and the cited provisions of the *2001 CCCMC Charter* make clear that the *2001 CCCMC Charter* is a measure that has the potential to affect trade and traders, including a wide array of domestic and foreign economic operators, in particular, the "trade activities" of business within the broad metals, minerals and chemicals industries. Accordingly, in line with the Appellate Body's view on "measures of general application" and previous panels' views on the scope of Article X:1, we conclude that the *2001 CCCMC Charter* is a law, regulation, judicial decision or administrative ruling of general application within the meaning of Article X:1.

7.1099 China submits that a resolution of 21 February 2001 confirms that the *2001 CCCMC Charter* replaced the *1994 CCCMC Charter*.[1551] Thus, from this statement it appears that the *2001 CCCMC Charter* became effective at a point in 2001.

1549. *2001 CCCMC Charter*, Article 6(1) (Exhibit JE-87).

1550. *2001 CCCMC Charter*, Article 3 (Exhibit JE-87).

1551. China's response to Panel question No. 69 following the second substantive meeting, paras 341-343; See Letter by the China CCCMC, 3 December 2010 (Exhibit CHN-541).

7.1100 The Panel further recalls its finding in paragraph 7.1017 above that the reference to "coordinat[ion]" of "export trade activities" in Article 3 of the *2001 CCCMC Charter* is broad enough to encompass price coordination, and that the CCCMC was indeed authorized to coordinate export prices under the *2001 CCCMC Charter*.[1552] The Panel concluded that the requirement to export at a coordinated minimum export price by its very nature has a limiting or restricting effect on trade, and therefore constitutes a restriction within the meaning of Article XI:1. Accordingly, for purposes of its Article X:1 assessment, the Panel further concludes that the *2001 CCCMC Charter* pertains to restrictions or prohibitions on exports within the meaning of Article X:1.

7.1101 Finally, the complainants assert that the *2001 CCCMC Charter* was not published on the CCCMC website until well into 2009, after the request for consultations in this dispute had been made, and therefore was not "published promptly" in a manner consistent with the requirements of Article X:1. The concept of "prompt" is not addressed in Article X:1 or elsewhere in the WTO Agreement. In the Panel's view, an analysis of whether a measure was published promptly requires a reference point, some act or thing to act as a point of comparison

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1552. The Panel recalls that Article 3 of the *2001 CCCMC Charter* specifies that the CCCMC is to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals industries". Article 6(3) provides that the CCCMC shall "promote the industry's self-discipline", including adopting "sanction measures against breaching companies.

so as to determine whether publication was prompt.[1553] It would seem an appropriate reference point in this instance should approximate the date when the *2001 CCCMC Charter* became effective. The Panel noted China's confirmation that that the *2001 CCCMC Charter* replaced the preceding Charter on 21 February 2001. Due to its publication in 2009, it therefore appears that *2001 CCCMC Charter* was only published on the CCCMC website eight years after the date that it had been made effective.

7.1102 Consequently, for the foregoing reasons, the Panel finds that China failed to publish promptly the *2001 CCCMC Charter* in such a manner as to enable governments and traders to become acquainted as is required under Article X:1 of the GATT 1994. Accordingly, the Panel concludes that China has acted inconsistently with Article X:1.

6. Summary

7.1103 At the time of the Panel's establishment, the Panel concludes that, under the measures at issue, China required exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked. The Panel concludes that this requirement, which was formally in force in China at the time of the Panel's establishment, constitutes a "restriction[] ... on the exportation or sale for export of any product" within

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1553. The panel in *EC – IT Products* stated that "the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases": see Panel report, *EC – IT Products*, para. 7.1074.

the meaning of Article XI:1 of the GATT 1994 because this requirement to export at a coordinated minimum export price by its very nature has a limiting or restricting effect on trade. The Panel also concludes that China failed to publish promptly the *2001 CCCMC Charter* in such manner as to enable governments and traders to become acquainted as is required under Article X:1 of the GATT 1994. The Panel does not make findings under Article X:3(a) of the GATT 1994 on whether China is in breach of its obligations in respect of China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 The Panel issues its findings in the form of a single document containing three separate Reports with common sections on the Panel's findings and separate sections on the Panel's conclusions and recommendations for each complaining party. The Panel's findings incorporate the conclusions of its preliminary rulings, attached to these Reports as Annex F.

2003 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE

[TABLES INTENTIONALLY OMITTED]

Export Regulation

China accepted in its WTO accession agreement that it would only maintain restrictions on exports (other than duties, taxes or other charges) where justified under WTO rules. Article XI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) generally prohibits WTO members from maintaining export restrictions, although certain limited exceptions are allowed.

China also agreed to eliminate all taxes and charges on exports unless they were included in Annex 6 to the Protocol of Accession or are applied in conformity with Article VIII of GATT 1994. Article VIII of GATT 1994 only permits fees and charges limited to the approximate cost of services rendered and makes clear that they shall not represent an indirect protection to domestic products or a taxation of exports for fiscal purposes.

Since its accession to the WTO, China has continued to impose restrictions and fees on exports of a few raw materials and intermediate products not included in Annex 6. In an attempt to justify these restrictions and fees, MOFTEC has invoked an exception in Article XX of GATT 1994 that permits a WTO member to impose restrictive export measures relating to the conservation of exhaustible natural resources, provided that such measures are made effective in conjunction with restrictions on domestic production or consumption, and provided they

are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Fluorspar is one example of a raw material that is still subject to this type of export regulation. China imposes quotas and license fees on fluorspar exports, apparently with the objective of supporting China's domestic users of fluorspar, which face no comparable restrictions.

In both 2002 and 2003, the United States raised its concerns about continuing export regulation of raw materials and intermediate products bilaterally with China. The United States also worked with other WTO members with an interest in this issue, including Japan, and it raised this issue during the transitional reviews of China's compliance efforts before the Council for Trade in Goods in November 2002 and November 2003. To date, however, China has refused to modify its export regulation practices in this area. The United States will continue to strongly urge China to lift these restrictions in 2004.

EXCERPTS OF THE UNITED STATES TRADE REPRESENTATIVE'S 2004 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, DATED DECEMBER 11, 2004

2004 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE

December 11, 2004

United States Trade Representative

[TABLES INTENTIONALLY OMITTED]

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Export Regulation

China's WTO accession agreement reinforces China's obligation to only maintain export restrictions allowed under WTO rules. Article XI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) generally prohibits WTO members from maintaining export restrictions (other than duties, taxes or other charges), although certain limited exceptions are allowed.

China also agreed to eliminate all taxes and charges on exports, except as included in Annex 6 to the Protocol of Accession or applied in conformity with Article VIII of GATT 1994. Article VIII of GATT 1994 only permits fees and charges limited to the approximate cost of services rendered and makes clear that any such fees and charges shall not represent an indirect protection to domestic products or a taxation of exports for fiscal purposes.

Since its accession to the WTO, China has continued to impose restrictions on exports of a few raw materials

and intermediate products. In an attempt to justify these restrictions, MOFCOM has cited Article XX(g) of GATT 1994, which permits a WTO member to impose measures relating to the conservation of exhaustible natural resources, provided that such measures are made effective in conjunction with restrictions on domestic production or consumption, and provided they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

In 2004, China's export restrictions on blast furnace coke, a key steel input, began to have a significant, adverse effect on U.S. integrated steel producers and their customers. China is the world's largest producer of coke, with total production of 177.7 million MT in 2003, as well as the world's most significant exporter of coke, supplying more than one-half of the world's traded coke. In 2004, China initially imposed an export quota of 8.3 million MT, down from the 2003 level of 14.3 million MT. In the first six months of 2004, China's export quota, combined with the illegal sale of export quota certificates, caused the export price for Chinese coke to rise to the vicinity of $500 per MT, more than three times the price in 2003. This price rise triggered a similar rise in world coke prices, while Chinese domestic prices ranged between $150 and $200 per MT.

The United States began to raise its concerns with China's coke export restrictions during high-level meetings in Washington in April 2004. The United States urged China to put the practice of using export restrictions behind it, not just for coke but also for other products.

The EC also became active in addressing this issue, as European steel producers normally source one-third of their coke needs from China. In May 2004, the EC reportedly used the threat of WTO dispute settlement to obtain China's agreement to guarantee European purchasers 4.5 million MT of Chinese coke in 2004, the same level that they had purchased in 2003.

As the U.S. industry became more concerned about decreased access to Chinese coke, along with soaring prices, the United States continued to engage China on this issue, both through high-level contacts and in a series of other meetings in May, June and July 2004 in Beijing. The United States sought to ensure that U.S. purchasers would have sufficient access to Chinese coke in 2004, pressed China to eliminate immediately the high export license fees resulting from the sale of export licenses, and urged China to establish a timetable for ending its export quota system. The EC and other WTO members also continued to raise their concerns with China.

In late July 2004, China raised the 2004 quota allotment to 12.3 million MT, and it indicated that it would eventually be raising the quota to the 2003 level of 14.3 MT. It did not, however, provide for country-specific quota allocations, instead continuing to leave it to individual purchasers to secure their own coke needs. Shortly thereafter, MOFCOM also issued an urgent notice reiterating that the sale of export licenses was illegal, calling for investigations into this practice by provincial MOFCOM authorities, and demanding reports by August 15.

In the ensuing months, with the increased supply of Chinese coke and the crackdown on the sale of export

licenses, the export prices for Chinese coke declined significantly, nearly reaching $200 per MT. U.S. industry was also able to obtain a substantially larger quantity of Chinese coke in 2004 than it had in 2003.

In September and November 2004, the United States continued to press China for complete elimination of the annual export quota on coke. Along with other WTO members, including the EC and Japan, the United States raised its concerns at the WTO during the transitional reviews before the Committee on Market Access and the Council for Trade in Goods as well as during side meetings. The United States also reiterated its concerns in bilateral meetings in Beijing in November 2004. The United States will continue to pursue this issue vigorously in 2005.

Fluorspar is another example of a raw material subject to export restrictions. China imposes quotas and license fees on fluorspar exports, apparently with the objective of supporting China's domestic users of fluorspar, which face no comparable restrictions. Since shortly after China's WTO accession, the United States has raised its concerns about these restrictions bilaterally with China. The United States has also worked with other WTO members with an interest in this issue, including Japan, and it raised this issue during the transitional reviews of China's compliance efforts before the Council for Trade in Goods in 2002 and 2003 and both the Committee on Market Access and the Council for Trade in Goods in 2004. To date, however, China has refused to modify its practices in this area. The United States will continue to urge China to lift these restrictions in 2005.

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EXCERPTS OF THE UNITED STATES TRADE REPRESENTATIVE'S 2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, DATED DECEMBER 11, 2006

2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE

December 11, 2006

United States Trade Representative

[tables intentionally omitted]

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Export Regulation

China's WTO accession agreement reinforces China's obligation to only maintain export restrictions allowed under WTO rules. In this regard, Article XI of the GATT 1994 generally prohibits WTO members from maintaining export restrictions (other than duties, taxes or other charges), although certain limited exceptions are allowed. China also agreed to eliminate all taxes and charges on exports, except as included in Annex 6 to the Protocol of Accession or applied in conformity with Article VIII of GATT 1994. Article VIII of GATT 1994 only permits fees and charges limited to the approximate cost of services rendered and makes clear that any [36] such fees and charges shall not represent an indirect protection to domestic products or a taxation of exports for fiscal purposes.

Nevertheless, since its accession to the WTO, China has continued to impose restrictions on exports of certain raw materials and intermediate products. In

an attempt to justify these restrictions, MOFCOM has often cited Article XX(g) of GATT 1994, which permits a WTO member to impose measures relating to the conservation of exhaustible natural resources, provided that such measures are made effective in conjunction with restrictions on domestic production or consumption, and provided they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

In 2004, China's longstanding export restrictions on blast furnace coke, a key steel input, began to have a significant, adverse effect on U.S. integrated steel producers and their customers. China was (and is) the world's largest producer of coke as well as the world's most significant exporter of coke, supplying more than one-half of the world's traded coke. Even though its total production was projected to (and did) rise to nearly 210 million metric tons (MT) in 2004, China initially imposed an export quota of 8.3 million MT, down from the 2003 level of 14.3 million MT. In the first six months of 2004, China's export quota, combined with the illegal sale of export quota certificates, caused the export price for Chinese coke to rise to the vicinity of $500 per MT, more than three times the price in 2003. This price rise triggered a similar rise in world coke prices, while Chinese domestic prices ranged between $150 and $200 per MT, giving Chinese steel producers a significant competitive advantage over their foreign competitors and helping to fuel the rapid expansion of China's steel sector.

The United States began to raise its concerns with China's coke export restrictions during high-level meetings in

Washington in April 2004. The United States urged China to put the practice of using export restrictions behind it, not just for coke but also for other products. The United States also began to coordinate with other concerned WTO members, particularly the EC and Japan, which had become active in addressing this issue. In late July 2004, following sustained engagement by the United States, which included both high-level contacts and a series of meetings with MOFCOM officials in Beijing, the Chinese government raised the 2004 quota allotment to 12.3 million MT and indicated that it would eventually be raising the quota to the 2003 level of 14.3 million MT. Shortly thereafter, MOFCOM also issued an urgent notice reiterating that the sale of export licenses was illegal and called for investigations and expedited reports on this practice by provincial MOFCOM authorities. In the ensuing months, with the increased supply of Chinese coke and the crackdown on the sale of export licenses, the export prices for Chinese coke declined significantly, reaching nearly $200 per MT. U.S. industry was also able to obtain a substantially larger quantity of Chinese coke in 2004 than it had in 2003.

In 2005, the United States continued to press China for complete elimination of the annual export quota on coke, as did other WTO members. The United States raised its concerns in bilateral meetings with China and at the WTO during the transitional reviews before the Committee on Market Access and the Council for Trade in Goods, but made no progress.

In 2006, the United States continued to press China to eliminate the export quota on coke, both bilaterally during Steel Dialogue meetings in March and October

and at the transitional reviews before the Committee on Market Access and the Council for Trade in Goods, held in October and November. Even though the export price for Chinese coke remained relatively low compared to the $500 per MT price of mid-2004, the export quota still kept world coke prices artificially high in 2006, and a significant differential still existed between China's domestic coke prices and world coke prices. However, the Chinese government continued its efforts to direct market outcomes by maintaining the export quota on coke. Indeed, in October 2006, China took the additional step of imposing a five percent duty on exports of coke.

Fluorspar is another example of a raw material subject to export restrictions, as China imposes both quotas and license fees on fluorspar exports. The objective of these export restrictions appears to be to support China's downstream producers of the numerous products derived from fluorspar, such as non-ozone depleting hydrofluorocarbon refrigerants and foam blowing agents. While their foreign competitors pay higher world market prices for fluorspar, China's downstream producers benefit from the artificially low domestic prices for fluorspar and are able to export their products around the world at prices well below those of their foreign competitors.

Since shortly after China's WTO accession, the United States has raised its concerns about the export restrictions on fluorspar bilaterally with China. The United States has also worked with other WTO members with an interest in this issue, including Japan, and raised this issue during the annual transitional reviews before the Committee on Market Access and the Council for Trade in Goods. To

date, however, China has refused to modify its practices in this area. In fact, China has increased the protection afforded to its downstream producers by lowering the export quota on fluorspar each year and, in October 2006, by imposing a 10 percent duty on exports of fluorspar.

In 2007, the United States will continue to work with interested trading partners on these issues. In coordination with those trading partners, the United States will urge China to act as a responsible stakeholder in the international trading system and eliminate the export restrictions that it maintains on raw materials such as coke and fluorspar.

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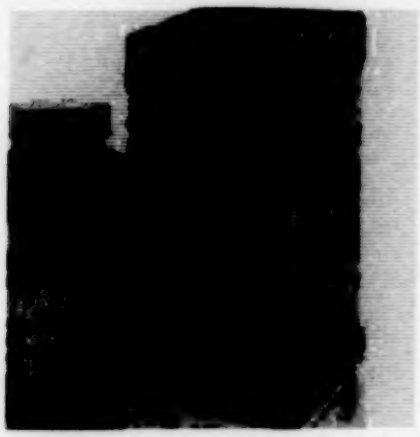
ASSORTED PRESS REPORTS RELATING TO THE VITAMIN C LITIGATION

GCR
Global Competition Review

US vitamin fine "unfair and inappropriate" says Mofcom

Katy Oglethorpe • Thursday, 21 March 2013 *(4 hours ago)*

Officials from China's Ministry of Commerce (Mofcom) have criticised the decision of a US federal jury to fine two Chinese vitamin manufacturers, warning that it could harm relations with US businesses.



Vitamins made by Aland, the first company to settle

The District Court in Brooklyn last week ordered Hebei Welcome Pharmaceutical and a related company, North China Pharmaceutical Group, to pay a class of Vitamin C buyers US$162 million for allegedly conspiring with other Chinese rivals to fix prices on vitamins sold to US consumers.

The vitamin makers say they were legally required to set price standards or face government-sanctioned penalties limiting their export capabilities. During the trial, a former Mofcom official testified that, indeed, the government set prices in the Chinese Vitamin C market and expected all of the companies in the industry to abide with them.

But the jury rejected the defence, known as the foreign sovereign compulsion doctrine.

Mofcom is now urging the court to reverse its decision, which a spokesperson this week called "unfair and inappropriate".

"The behaviour of Chinese enterprises was in full compliance with China's laws and regulations," says the spokesperson. "The relevant Chinese enterprises implemented the mandatory requirements of the government departments and behaved appropriately.

"We hope the US court fully takes into account the special nature of the facts of the case [and] fully respects the sovereignty of the Chinese government, as well as fully safeguards the proper international order."

Mofcom says the ruling was "clearly contrary to the principles of international comity".

"This erroneous decision, if not corrected, will cause problems for the international community and international enterprises, and will eventually harm the interests of the United States due to the increase of international disputes," says Mofcom.

Ranis, a food company based in Elizabeth, New Jersey, led a group of plaintiffs that gained class certification in

January. The company claimed that from 2001 to 2006, four Chinese vitamin makers participated "in a conspiracy to fix prices and limit supply" to increase prices in the US.

Jiangsu Nutraceutical and Northeast Pharmaceutical Group settled their alleged parts in the conspiracy for US$10.5 million and US$1 million respectively.

John Terzaken, partner at Allen & Overy and the former director of criminal enforcement at the US Department of Justice's antitrust division, says China should expect to adapt to non-domestic antitrust laws.

"It is axiomatic that if a multinational wants to reap the benefits of selling in a particular jurisdiction, it must also be ready to accept responsibility for following the laws of that jurisdiction," he says. "A competition regulator like Mofcom, whose responsibility is to protect businesses and consumers from anti-competitive acts, can hardly be surprised that companies proven to have fixed prices would be held accountable to pay damages to victims harmed by that conduct."

Terzaken says this is "particularly true" given recent prosecutions in the liquid crystal display (LCD) case, where China's National Development and Reform Commission (NDRC) fined a cartel 353 million renminbi (US$56.7 million) – by far the agency's first global cartel decision.

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China Criticizes U.S. Ruling on Vitamin C Makers

By LAURIE BURKITT

BEIJING—Beijing lashed out Tuesday at a U.S. court decision finding Chinese manufacturers of vitamin C liable for price fixing, saying the ruling would have negative global repercussions.

Officials from China's Ministry of Commerce urged the U.S. court to reverse its decision, saying the ruling was unfair to the Chinese companies, Hebei Welcome Pharmaceutical Co. and affiliated company North China Pharmaceutical Group Corp.

The two companies were ordered last week to pay $162 million in damages for the antitrust claims in a civil trial in federal court in Brooklyn.

"If they don't correct the mistake, it will bother the global society and global companies, which eventually harms U.S. interests by increasing national disputes," a government spokesman said at a news briefing Tuesday.

Experts say that strong language from China's government raises the possibility of a tit-for-tat response. "This is a not-too-subtle hint that we can expect retaliation against American companies doing business in China," said James Zimmerman, partner with the Beijing office of the international law firm of Sheppard Mullin Richter & Hampton LLP.

The U.S. and China are tussling over trade issues on a number of fronts, including China's dominance in the production of "rare earth" minerals, used in manufacturing, and state support in the ailing solar-panel industry.

North China Pharmaceutical plans to appeal the fine, the state-run Xinhua news agency said Sunday.

Plaintiffs, including a Texas animal-feed company and a New Jersey vitamin distributor, alleged the Chinese vitamin C makers voluntarily formed an illegal price-

fixing cartel that increased prices significantly and resulted in tens of millions of dollars of added costs for U.S. consumers since late 2001.

The vitamin C makers argued that Beijing forced them to coordinate pricing and output.

Attempts to blame the price fixing on directives from the Chinese government ran counter to China's declarations to U.S. government agencies and the World Trade Organization that it doesn't compel price fixing for any exported product, the plaintiffs argued.

The raw vitamins from the Chinese companies were used as food and beverage ingredients, consumer vitamin supplements and animal products, the plaintiffs said.

China's Commerce Ministry said it would continue to support the Chinese companies. It previously filed papers supporting the companies' position and urged that the case be thrown out, saying it couldn't be resolved without interfering with China's affairs.

MOFCOM's Shang says US judgment in vitamin C case shows 'disrespect'

MOFCOM to support Chinese company's appeal in case

Case's reversal at appellate court level seen possible

A key Chinese antitrust regulator said he is "very dissatisfied" with the judgment from a US district court against Chinese vitamin C manufacturers following a recent high-profile antitrust jury trial, saying the decision indicates "disrespect" for the Chinese government.

Shang Ming, director general of the Anti-Monopoly Bureau under the Ministry of Commerce (MOFCOM),

said the Chinese government should have the last say on the interpretation of Chinese law, not a US court judge. He also said MOFCOM, which has the responsibility to give guidance to Chinese companies on antitrust matters overseas, will support the Chinese company's decision to appeal the judgment.

Shang made the comments at a symposium held by the China Institute of International Antitrust and Investment in Beijing Friday (22 March).

"In this case, MOFCOM and myself, during the course of the case had submitted amicus curiae briefs more than three times to the court, representing the Chinese government," Shang said. "There is one situation where the companies in a monopoly agreement may be exempted: that is if they are bound by the local law or act under the administrative order of the government. That is precisely what we wanted to prove."

Shang said MOFCOM's previous requirement that export companies must be disciplined by trade associations under the "export pre-examination and approving system" was a product of China's structural reform in trade. That system was scrapped in 2008.

"[The vitamin C companies' price] agreement was reached under this circumstance," Shang said. "But unfortunately, the judge did not accept this argument."

"Here I would like to express my deep dissatisfaction toward the US judge, because Chinese law should be interpreted by China's administrative body, or the agency that has the right to do so, not by a [foreign] judge," Shang said. "The fact that he did not accept our interpretation, I believe, shows disrespect, to say the least."

The vitamin C antitrust case generated much discussion at the symposium, attended by antitrust attorneys, as well as Chinese and foreign antitrust regulators, with some questioning whether the judgment was reasonable.

Willard Tom, a partner at Morgan Lewis and a former general counsel of the US Federal Trade Commission (FTC), said the US court system has generally moved away from "deferring to vague expressions" of foreign intent as a defence in cartel cases. And the judge had to take into consideration not only MOFCOM's amicus brief, but also the plaintiff's argument that the vitamin C manufacturers acted voluntarily, and MOFCOM's position that it no longer practices export licensing.

"I'm not sure why one would expect to succeed simply on the basis of an amicus filing by a foreign government," Tom said. "These foreign sovereignty compulsion defenses are very very difficult to succeed on. ... Was this district court judge unreasonable? We will see if the appellate court reverses [the judgment]."

Chen Huanzhong, vice chairman of the anti-monopoly law committee of the All China Lawyers Association (ACLA), China's bar association, said the vitamin C case has gone beyond a legal question to the level of diplomacy and the China-US bilateral relationship.

He said he believes the Chinese company may have a chance to reverse the judgment at a higher level US court, which will have more authority to consider foreign sovereign defenses.

The US District Court, Eastern District of New York, on 14 March entered judgment for USD 153.3m after trebling

a jury's USD 54.1m verdict in favor of a direct purchaser class on its allegations that Chinese corporations participated in an illegal cartel to fix prices and limit supply for export of vitamin C to the US.

The jury concluded that Hebei Welcome Pharmaceutical and its parent North China Pharmaceutical Group Corp. (NCPGC) "knowingly entered into an agreement or conspiracy with the purpose of or predictable effect of fixing the price or limiting the supply of Vitamin C."

The jury rejected the defendants' argument that they were compelled by the Chinese government to enter into the agreements from 1 December, 2001 to 30 June, 2006 and that they "faced the prospect of penalties or sanctions for not complying with the directives or commands of the Chinese Government."

Shang's comments Friday echoed MOFCOM spokesman Shen Danyang's stern words 19 March, when he called the vitamin C trial judgment "unfair" and "inappropriate."

Shen said that the heavy penalties for these Chinese companies were inappropriate, as they violated the "doctrine of international comity", the principle of "foreign sovereign compulsion defense" and the "act of state doctrine", and that they also went against the spirit of the rule of law that the US has been claiming.

He said the US should give full respect to China's sovereignty. He also called the judgment a "wrong decision," which, if not corrected, could promote international disputes and harm American interests.

by Joy C. Shaw and Eliot Gao in Beijing

MINISTRY OF COMMERCE
PEOPLE'S REPUBLIC OF CHINA

Regular Press Conference of the Ministry of Commerce on March, 19 2013

March 28, 2013 - 14:57 BJT (18:57 GMT) MOFCOM

Dear friends from the Press,

Welcome to the press conference today. I'm ShenDanyang, spokesman of the Ministry of Commerce. I am very glad to meet you all again and make a briefing on China's business performance in January - February this year, and answer your questions.

I. Domestic Market Operation

Retail sales of consumer goods in January and February amounted to 3.781 trillion Yuan with anominal increase of 12.3% year-on-year and 2.4 percentage point lower as compared with that of the same period of previous year. The actual growth was 10.4% year-on-year, when price fluctuation excluded, 0.4 percentage point lower as compared with that of the same period of previous year.

1. Consumptionin rural areas grew faster than that of urban areas.Urban consumptionin urban areas was up by 12.1%, while rural consumption saw an increase of 13.4%. The growth rate of rural consumption exceeded that of urban areas again, 1.3 percentage points higher as compared with that of urban consumption.

2. Sales of housing and leisure goods increased. Affected by the soon-to-expired policy of "Appliances to the Countryside" and promotion during Chinese New Year by

lunar calender, sales value of home appliances, furniture and building and decorating materials in 3,000 key retailersmonitored by MOFCOM rose 20.1%, 4.2% and 0.2% respectively as compared with that of previous year. The growth rate of household appliances and audiovisual equipment, and sports and entertainment products in enterprises above designated size was 19.6 and 8.4 percentage points faster than that of the same period over previous year. Sales of furniture and building materials rose 20.9% and 17.7%, which significantly higher than the average level of sales of enterprises above designated size.

3. Demands for automobiles and communication commodities slowed down. Sales of communication commodities in 3,000 key retailersmonitored by MOFCOM rose 4%, dropped 8.6 percentage points as compared with that of previous year. The growth rate of automobiles, petroleum and petroleum products, and communication equipment in enterprises above designated size was down by 5.8%, 9.2% and 32.7% respectively as compared with that of previous year.

4. Sales by medium and large sized circulation enterprises saw a slight slowdown. Sales of 3,000 key retailers monitored by MOFCOM was up by 7.9% year-on-year, 0.4 percentage point lower than that of the same period of previous year. Retail sale of consumer goods in enterprises above designated size rose 10.2% yet the growth rate was lower than the average level of national consumption growth.

5. Consumption in catering dropped significantly. Catering revenue grew 8.4%, 4.9 percentage points

lower as compared with that of previous year and was the lowest since July, 2003. Large sized and high-end catering consumption dropped significantly. Revenue of catering enterprises above designated size was down by 3.3% year-on-year. Sales of key catering enterprises monitored by MOFCOM dropped 2.3% as compared with that of previous year.

6. Consumer prices maintained steadily. The consumer price in January and February rose 2.6%. Among that, February saw an increase of 3.2%, 1.2 percentage points higher than that of January, setting the record high in eight months. In February, CPI rose 1.9% year-on-year driven by foodstuff, and foodstuff accounted for 73% of CPI increase. The wholesale price of beef, eggs, peanut oil and mutton monitored by MOFCOM rose by the largest margin of 31.7%, 18.3%, 17.8% and 14.2 respectively, while that of pork and fruit dropped 4.1% and 5.1% respectively.

II. Foreign Trade

According to Customs statistics, total value of our import and export in January and February were of 3.83 trillion Yuan (US$609.31 billion), up by 14.2%year-on-year, exchange rate fluctuation excluded (same as below). Among that, exports amounted to 2.05 trillion Yuan (US$326.73 billion), up by 23.6%; and imports amounted to 1.78 trillion Yuan (US$282.58 billion), up by 5%. Trade surplus was 277.82 billion Yuan (US$44.15 billion). Trade deficit last year was US$4.78 billion. The main features of foreign trade are as follows:

1. Trade with U.S. and ASEAN was steadily up and with HK and South Africa increased rapidly. China-U.S. trade in January and February rose 14.8%, and China-ASEAN

trade was up by 23.4%. Mainland China-HK and China-South Africarose 58.7% and 70.1% respectively, 44.5 and 55.9 percentage points higher than the overall growth rate of our foreign trade. Besides, China-EU trade rose 3.2%, and China-Japan trade dropped 8.2%.

2. Export by the central and western Chinaremained robust; export by Guangdong and Fujian province in eastern China increased significantly and export growth in other provinces remained steady. In January and February, growth rate of exports of Sichuan,Chongqing, Jiangxi and Anhui was 72.7%, 54.8%, 140.7% and 138.1% respectively; growth rate of export of Guangzhou was 34.2%, still ranking first, and the growth rate of Fujian was 32%.

3. Export by general trade and import by processing trade grow significantly. Total value by general trade in January and February was US$316.62 billion, up by 11.5%. Among that, exports amounted to US$159.79 billion, up by 29.9%; imports registered US$156.84 billion, dropped by 2.6%. Import and export by processing trade was US$202.58 billion, with an increase of 7.6%, among that, export registeredUS$128.30 billion, up by 5.9% while import amounted to US$74.28 billion, up by 10.5%.

4. Private enterprises become the main driving force in export and import; exports of state-owned enterprises and foreign-invested enterprises grew slowly, while imports showed negative growth. In January and February, export by private enterprises was US$134.82 billion, up by 61.1%, 37.5 percentage points higher overall growth rate of export, while import by private enterprises registered US$81.84 billion, up by 35.3%, 30.3 percentage points

higher overall growth rate of import. Export by SOEs was up by 3.6%, while import dropped 6.8%. Export by foreign-invested enterprises rose 7.0%, while import was down by 1.9% over the previous year.

5. Exports of mechanic and electronic products grew steadily, and expot of labor-intensive products grew significantly. Exports of mechanic and electronic products in January and February registered US$187.81 billion, up by 20%, accounting for 57.5% of total exports; while imports was US$117.63 billion with an increase of 9.1%, 4.1 percentage points higher than that of the total imports. Total export of high-tech products was US$99.18 billion and rose by 26.2%, 2.6 percentage points higher than that of the total exports. Import of high-tech products registered US$79.83 billion and rose by 20.1%, 15.1 percentage points higher than that of total imports. Total export of clothing, textiles, footwear, furniture, plastic products, bags and suitcases and toys was US$69.57 billion and rose by 40.3%. Import of iron ore, crude oil, soybean and copper dropped 1.5%, 2.4%, 9.0% and 27.8% respectively, while import of coal and refined oil rose 34.3% and 6.1% respectively.

III. Foreign investment

From January to February of 2013, 2,915 foreign-invested enterprises were newly established, down by 3.00% year on year; realized FDI reached US$17.484 billion, down by 1.35% year on year. Among that, in February, 1,032 foreign-invested enterprises were newly approved, down by 35.62% year on year; realized FDI amounted to US$8.214 billion, up by 6.32% year on year, turning

positive for the first time after eight consecutive months of negative growth. The main features of foreign investment during January-February period are as follows:

1. Foreign investment in service sector saw a certain amount of growth. From January to February, realized FDI in service sector reached US$8.449 billion, up by 5.49% year on year, accounting for 48.32% of the total national amount over the same period. Realized FDI in agriculture, forestry, animal husbandry, and fishery amounted to US$177 million, down by 43.22% year and year, taking up 1.01% of the national total in foreign investment absorption. Realized FDI in manufacturing sector registered US$7.472 billion, down by 10.64% year on year, accounting for 42.74% of the national total over the same period.

2. Investments from the EU countries grew relatively faster. From January to February, realized FDI from EU 27 countries reached US$1.214 billion, up by 34.01% year on year. Realized FDI from the US registered US$497 million, down by 5.37% year on year. Realized FDI from ten countries/regions in Asia (Hong Kong, Macao, Taiwan, Japan, the Philippines, Thailand, Malaysia, Singapore, Indonesia and South Korea) amounted to US$15.178 billion, down by 1.31% year on year. Among that, realized FDI from Japan reached US$1.269 billion, down by 6.70% year on year.

3. Realized FDI in the central China continued to maintain a good momentum. From January to February, realized FDI in the central China was US$1.496 billion, up by 4.76% year on year, accounting for 8.56% of the total national amount; the figure in the eastern China was US$14.912

billion, down 1.58% year on year, accounting for 85.29% of the national total; the figure in the western China was US$1.075 billion, down 5.95% year on year, taking up 6.15% of the national total.

IV. Investment and economic cooperation overseas

Direct investment overseas. From January to February of 2013, Chinese investors had directly invested in 1,187 overseas companies in 133 countries and regions, and total direct investments in non-financial sectors reached US$18.388 billion, up by 147.3% year on year. From January to February, investments by mainland China in the seven economies including Hong Kong, ASEAN, EU, Australia, the US, Russia and Japan reached US$15.893 billion, accounting for 86.4% of the total national direct investment overseas over the same period. Among that, the investments in Hong Kong, ASEAN, EU, Australia and the US were up by 155.8%, 114%, 81.9%, 281.8% and 145.7% respectively while that in Russia and Japan were down by 46% and 31% respectively. From January to February, direct investment overseas by provinces reached US$3.4 billion, accounting for 18.5% of the total investment overseas over the same period.

Contracted projects overseas. From January to February of 2013, turnover of China's contracted projects overseas amounted to US$13.04 billion, up by 13.4% year on year, and value of newly-signed contracts was US$20.23 billion, up by 39.8% year on year. The projects each with a contract value above US$50 million were 91 (52 over the same period of last year), with a total value of US$14.92 billion, accounting for 73.8% of the total value of newly-signed contracts. Among that, the projects each

with a contract value above US$100 million were 49, an increase of 15 over the same period of last year. By the end of February 2013, total contract value of the projects overseas reached US$1.0184 trillion with the realized turnover of US$668.6 billion.

Labor service cooperation overseas. From January to February of 2013, laborers sent abroad reached 57 thousand, an increase of one thousand over the same period of last year. Among that, laborers sent abroad for contracted projects were 30 thousand and that for labor cooperation projects were 27 thousand. By the end of February, all laborers sent overseas totaled 819 thousand, an increase of 20 thousand over the same period of last year.

21st Century Business Herald: What's your comment on strong exports and weak imports in first two months of 2013 and the huge trade surplus? Will there be any policies to promote imports? How do you view the foreign trade situation for the whole year, and will the goal of 10% trade growth be realized? Thank you.

ShenDanyang: According to Customs statistics, export growth was indeed strong in the first two months, while there was a relatively slow import growth. As you said, we have strong exports and weak imports. This has caused some concerns, and we are studying the reasons behind it.

A number of factors contributed to the fast export growth in January-February. There were three main causes according to our preliminary analysis: Firstly, the policies to stabilize trade growth continue to exert its effects. For example, we have policies on tax reduction, speeding up the export refund process and financial supports, which

will still remain stable and effective this year. These policies have notably promoted export growth.

Second, foreign trade enterprises are taking active steps to transform their development mode, engage in restructuring, and foster innovation and competitive advantages. Such efforts have led to a rapid growth of exports of machinery and electronic products and high-tech products. High-tech exports rose by 26.2% in the first two months, and exports of machinery and electronic products rose by 20.1%, of which integrated circuits, mobile phones and parts, automatic data processing equipment and parts, motorcycles, power assisted bicycles, bicycles, watches, lamps and lighting devices were up by over 15%.

Third, some external markets have shown signs of recovery. Of course, there were some other factors, such as seasonal factors, and the relatively small export volume in the same period of 2012. Another factor is that there was a trade deficit in January and February 2012, with imports growth outpacing export growth, while the situation reversed in 2013.

Besides, we are also looking at other possible factors. It is difficult to make an accurate judgment for the whole year based only on the statistics of the first two months. We will have to wait and see.

ShenDanyang: Accordig to Customs statistics, China's imports fell by 15.2% year-on-year in February, mainly due to seasonal factors including the Chinese Lunar New Year. According to seasonally adjusted Customs statistics, imports growth in February saw a slight rise of 6.5%. According to MOFCOM analysis, import growth

rate in first two months was down as compared with that of 2012, mainly due to weak domestic demand and falling commodity prices in international market. For example, prices of several types of bulk commodities fell sharply in the first two months. Billet, cotton and natural rubber fell by 26.9%, 20.1% and 13% respectively, and steel, iron ore and crude oil were down by 12.2%, 11.2% and 4.1% respectively. China imports these commodities in large quantities, so falling import prices are not necessarily a bad thing.

As proposed in this year's government work report, we need to pursue at the same time stable exports and increasing imports. Guided by such a principle, MOFCOM will continue to take measures to promote the growth of imports and at the same time stabilize exports. We will take three measures. First, we will improve the structure of import tariffs, and adjust the Catalogue of Encouraged of Imports, and promote import growth through fiscal and financial measures. Macroeconomic policies and import growth are connected, and we need to use fiscal, taxation, financial and other policy measures in tandem.

Second, we will strengthen the building of an import promotion system, give support to the African Commodities Exhibition and the South Asian Merchandise Show, and organize enterprises to carry out imports promotion overseas. Some countries that have a trade deficit with China are asking whether China could expand imports. We would say that we will make efforts to encourage enterprises to expand imports. However, the decisions have to be made by enterprises of the two sides. China cannot act alone and the other country should also take

measures to promote trade. For example, we often say to our American friends that they should also make efforts to promote exports to China. All countries including the US can cooperate with China's trade promotion agencies to do more trade promotions. Trade promotion measures will bring positive impacts.

Third, we will increase the number of innovation demonstration areas for increasing imports at a stable pace, and give play to the role of import trade clustersin increasing imports in the neighboring areas. Thank you.

CCTV: According to the statistics you just released, foreign capital utilization posted a negative growth in January-February 2013, but there was a growth of about 6% in February. Does that mean China's foreign capital utilization has turned toward the better? And what's your view on the situation for the whole year? Thank you.

ShenDanyang: China's foreign investment utilization posted small amplitude fluctuations recently due to slow global economic recovery and less than abundant global investment. Our actualized foreign investment declined for a few successive months in 2012. However, against the global backdrop, we believe that the overall situation of China's foreign investment utilization maintained stable development. In 2012, global cross-border direct investment fell by 18% and foreign investment inflows into Asia decreased by 9.5%. Although foreign investment inflow into China declined by 3.7%, we still had the best performance among major foreign investment host countries. In February 2013, China's actualized foreign investment saw a slight rebound, with a growth of 6.32%, which was the first positive growth after eight consecutive months of negative growth. It proved, to a certain extent,

the competitiveness of China's economy and recognition by international investors of China's investment environment and development prospects.

As for foreign investment utilization prospects for the whole year, it is difficult to predict whether the situation will improve for the whole year based on the statistics of in January and February alone. Generally speaking, foreign investment utilization in 2013 will be steady, and is unlikely to have big fluctuations. Thank you for your question.

China Business News: You just said that total retail sales of consumer goods had a nominal increase of only 12.3% in January-February 2013, and an actual increase of 10.4%, a pace much slower than before. What are the main causes for the slowdown of consumption growth? And what's your comment on the domestic consumption situation in 2013? Will MOFCO take any specific measures to expand consumption? Thank you.

ShenDanyang: As I just shared with you, nominalgrowth rate and actual growth rate of the total retail sales of consumer goods in January-February were down by 2.4 percentage points and 0.4 percentage points respectively. There were several underlying factors, including thecurbing of extravagantconsumption. The catering sector had a revenue increase of only 8.4% in the first two months, a growth rate of 4.9 percentage points lower. Especially, the revenue of catering enterprises above the designated size declined by 3.3%.So this is one factor.

Another factor is the growth of oversees travelling during such time as the Spring Festival of 2013. As a result, some consumption moved abroad. This might be another factor.

Of course, some believe that there are other factors such as the policies of certain cities on limiting car purchase and usage, high oil prices, parking difficulties, which slowed the consumption of automobiles and fuels. There could be more, and we are still making analysis. However, consumption did not trend notably downward, and the growth rate was only down by 0.4 percentage points.

Generally speaking, we are optimistic, for a good reason, on the situation of consumption in 2013. For example, in recent years, China's policies to promote consumption growth have been changed from short-term stimulus to cope with the international financial crisis into a long term fundamental mechanism. The government has released a number of policies conducive to stimulating consumption in the long run. Recently, the State Council approved and issued documents on deepening the reform of the income distribution system and promoting employment. The purpose is to increase the income of residents and increase employment, which will be conducive to expanding consumption. The State Council also issued documents on carrying out pilot programs on the new type of social pension insurance in rural areas and on improving the mechanism of essential drugs, announced policies for ensuring the basic livelihood of the low-income people, and reducingmedical costs, which will also help to enhance people's consumption capability and improve their consumption expectation. What's more, the State Council has issued the 12th Five-Year Plan Program for the Development of the Service Sector and the Outline for National Tourism and Leisure. These documents give priority to the development of domestic services such as housekeeping services, care for the aged and community-based care, in order to meet the basic needs of Chinese

families, require that the paid-vacation system be truly effective, and suggest exploring the feasibility of having Spring Break and Autumn Break for the students. Such initiatives will be conducive to release the consumption potential of domestic services and travel and leisure and increase total consumption.

In addition, many friends here may be interested to know that we will continue the "Subsidy Scheme on Energy-conserving Products" to subsidize consumers who purchase energy efficient products such as lightings, cars, air-conditioners, refrigerators, flat-panel TVs, washing machines, water heaters and desk computers, which will speed up the upgrading of electrical household appliances and promote green consumption. These policies will help solve such frequently discussed problems as "having no money to spend" or "being afraid to spend". Therefore, as long as the economy goes well, the consumption trend in 2013 should be promising. Of course, though there is great potential for expanding consumer spending, many difficulties exist. We must make efforts at all four fronts, namely increasing consumption capability, stabilizing consumption expectation, enhancing consumption willingness and improving consumption environment, in order to secure a steady growth of consumption.

Among these four aspects, MOFCOM is mainly responsible for improving consumption environment. Last year, the State Council promulgated Several Opinions on Deepening Circulation System Reform and Speeding up Development of Circulation Industry, or NO. 39 Document of the State Council; and issued the Comprehensive Work Plan on Lowering Circulation Cost and Enhancing Circulation Efficiency, which unveiled favorable policies

covering planning, tax, fiscal aspects, finance, land and fee reduction. These policies are conducive to lowering circulation cost and improving consumption environment. This year, MOFCOM will endeavor to do a good job in this aspect. Thank you for your question.

International Business Daily: My question is about the price-fixing case of Vitamin C. As we know, recently, media reported that a federal court in New York ruled over the price-fixing case involving North China Pharmaceutical Group Corp (NCPC) and its affiliated company, found that the two companies were engaged in price-fixing of vitamin C in the US in recent years. The report also said the Chinese Ministry of Commerce issued judicial document to support the position of the two companies and urged the withdrawal of the case. Could you please confirm if the above information is accurate? And what is the comment of MOFCOM? Thank you.

ShenDanyang: MOFCOM has learnt about the ruling of the US Federal Court on the antitrust case on vitamin C against Chinese companies, and we consider it to be unfair and improper. According to our understanding, the conduct of relevant Chinese companies totally conformed to the Chinese laws and regulations of the time. The companies concerned took the actionsin order to comply withthe compulsory requirements of the Chinese government. MOFCOM filed official written statements for three times in the form of amicus brief, and explicitly notified the US court that the charged Chinese enterprises acted on the government's requirement. It is totally improperfor the US court to impose heavy fine against Chinese enterprises for their lawful conducts. To take jurisdiction over Chinese enterprises' conducts resulting

from compulsory government requirements is obviously against the Comity principle and the Foreign Sovereign Compulsion Doctrine and Act of State Doctrine, and is inconsistent with the spirit of governance by law as always advocated by the US government. If such mistakes are not corrected, it will be worrisome forthe global society and companies, which will lead to increasinginternational disputes and eventually harm US interests.

We hope the US court can fully consider the facts of the case and the particularity of the Chinese economic reform being in the transition period, fully respect the sovereignty of the Chinese government, and maintain the order of the international community. We will continue to firmly support Chinese companies who comply with the laws to actively protect their legal rights and interests. Thank you.

Asahi Shimbun: President Xi Jinping is going to visit Russia. Would you brief us on the latest development in China-Russia trade and economic relations? In addition, recently, the Japanese government announced that it will take part in the TPP negotiations. How does China look at the relationship between TPP and China-Japan-ROK FTA? Are they complementary or competing? Thank you.

ShenDanyang: President Xi Jinping's visit to Russia will play a positive role in promoting the development of China-Russia trade and economic cooperation. Currently, the momentum of China-Russia trade and economic cooperation is good. The bilateral trade volume in 2012 hit the record high of US$ 88.16 billion, up by 11.2% year on year. China has been Russia's largest trade partner for three consecutive years. If the bilateral trade continues to grow at the current speed, the goal set up by the leaders

of our two nations to increase bilateral trade to US$ 100 billion in 2015 and US$ 200 billion in 2020 can certainly be achieved.

Investment cooperation betweenthe two countries is also speeding up, and has three characteristics: first, China's investment to Russia has been growing rapidly. According to Chinese statistics, by the end of 2012, the accumulated non-financial direct investment from China to Russia was US$ 4.42 billion, registering an average increase of over 40% over the past ten years. In 2012, China's investment to Russia was US$ 656 million, up by 116.2% year on year. Second, our cooperation on major projects goes smoothly. A number of large-scale cooperation projects in such fields as energy, nuclear energy, aerospace &aviation, science and technology and transportation, represented by such projects as China-Russia oil pipeline, Tianjin Oil Refinery, Tianwan Nuclear Power Station, R&D inlong-range wide-body aircraft and heavy-duty helicopter, and Tongjiang Railway bridge, have strongly supported the sustainable development of the bilateral trade and economic cooperation. Third, bilateral cooperation in the financial sector and cooperation between local regions and entrepreneurs of the two countries have also made new progress. We believe that the visit of President Xi will promote the speeding up of investment cooperation between the two sides.

As to Japan's taking part in the TPP negotiation as you just mentioned, we always hold the view that all economies in the world have the right to choose the path towards economic integration that suits their own national conditions and development level, and we have an open and inclusive attitude toward all cooperation that aims at

realizing regional economic integration. We also believe that the multilateral trading system that the vast majority of the countries in the world are parties to remains the main channel for promoting international trade liberalization, and that any regional and bilateral trade arrangements should be a useful complement to rather than a substitute for the multilateral trading system. We will keep contacts and communications with other parties, and carry out in-depth analysis of the potential impact of the above-mentioned negotiations. Meanwhile, as we all know, China will step up efforts on our own FTA strategy. Thanks for your question.

China News Service: According to media reports from Korea, at the end of March, Chinese, Japanese and Korean governments will meet for three days and hold the firstround of negotiations on China-Japan-ROK FTA. Could you please confirm? Can you share some specifics? Thank you.

ShenDanyang: Having consulted among the three sides, China, Japan and ROK will hold the firstround of China-Japan-ROK FTA negotiationsin Seoul, South Koreaon March 26-28, 2013. The representatives of the three nations will discuss the mechanism arrangement, negotiation fields and negotiation mode of the FTA negotiation. The three sides have agreed to hold three rounds of negotiations this year, first in Korea, then in China and finally in Japan. China, Japan and ROK are important economies in East Asia and have close trade and economic cooperation.To establish the FTA as soon as possible accords to the common interests of the three nations and is conducive to regional peace and development. We are of the view that, followingthe launch

of the China-Japan-ROK FTA negotiation, the stability of the relations among the three sides will be the political basis for smooth future negotiations. We would like to join efforts with Japan and ROK to promote China-Japan-ROK FTA negotiation to make positive achievements as soon as possible. Thank you.

Economic Daily: Judging from past experiences, spring is often a season of sluggish market for agro-products. Based on information available to MOFCOM so far, will it happen this year, and what kind of measures will MOFCOM adopt? Thank you.

ShenDanyang: Thanks for your keen observation. Indeed, according to past experiences, the sales of agro-products such as fruits and vegetables will decline after the Spring Festival, the price will drop and the market will become sluggish. Therefore, after this Spring Festival, MOFCOM has taken some target measures to strengthen market monitoring. We hope to provide guidance to farmers and to nip the problems in the bud.

We have noticed that recently lettuces from Pengzhou, Sichuan and Honghu, Hubei, apples from Yongjing, Gansu, and peppers and chayote from Hainan are difficult to sell. MOFCOM responded quickly, and launched the working mechanism for addressing difficulties in selling agricultural products. We also urged and guided local commerce authorities to work with relevant departments to intensify marketing efforts, make available better sales channels, strengthen the direct links between markets and farmers, and encourage enterprises to purchase and store. Such efforts have effectively mitigated the selling difficulties.

Similar situations may occur in some individual places and to some individual agricultural products. MOFCOM and local commercial departments have already established a set of plans to response to such problems. I briefed you on our working mechanisms several times atlast year's press conferences and these working mechanisms have been further improved. Going forward, we will continue to pay close attention to the production andsales of agricultural products, and, in the principle of making "product based responses at different levels", build and improve the SOS system for the sales of agricultural products, and provide assistance to local governments in taking contingency measures to address those more prominent selling difficulties.

With regard to how to solve the root of reoccurring issues such as selling difficulties and rising prices, or in other words how to establish a lasting mechanism, a topic that is of much interest to the media, MOFCOM will make greater efforts to ensure balanced supply and demand of agricultural products. The goal is to solve selling difficulties and ensure sufficient market supply at the same time. We are taking a three-part approach, targeting issues at the producing areas, distribution centers and destination markets, to find fundamental solutions. First, at distribution centers, we will strengthen the building of wholesale markets there, and give a full play to the role of wholesale markets in connecting producing areas and destination markets. The goal is to build a stable and efficient cross-region production and sales chain. Second, at producing areas, we will strengthen the building of logistics centers to enhance the preservation, storage and transportation capabilities, and work for better coordinated peak marketing times. For example,

we will enhance the storage capabilities at distribution centers, and in the event of excessive supply of a certain agricultural product, we can put these products in storage and market them later when there is a change in the supply-demand dynamics. Third, at destination markets, we will improve such infrastructure as comprehensive processing and distribution centers at wholesale markets of agricultural products and promote promoting the building of urban convenience food markets.

Currently, the overall supply and demand of China's agricultural market is basically balanced now. Of course, individual cases of selling difficulties may occurat some locations due to regional, structural, and temporary imbalances.However, in the medium and long run, the overall agricultural prices will trend upward due to rising costs of agricultural production. We need to focus more on how to build better channels of commerce, reduce costs and ensure supply in order to have a stable market and stable prices. Thank you for your questions.

Agence France-Presse: We know that President Xi Jinping is soon to visit a number of countries, including countries in Africa. However, thegover nor of the Nigerian Central Bank governor recently saidthat it was a typical practice of colonialism thatChina importsprimary products from African countries and sells finished products back to those countries. What's your comment? Could you share with us the latest China-Africa bilateral trade data?

ShenDanyang: We have noticed the article you mentioned, but we do not agree with the governor's opinion. I would recommend that the governor take a good look at the history of colonialism by Western countries. People with

some basic knowledge of the history of colonialism all know that there is a fundamental difference between China-Africa economic and trade cooperation and colonialism. In the past, Western countries plundered Africa's resources, trafficked African people, occupied the land of Africa and destroyed African culture by force and deception, which is the nature of colonialism. For years, China has been providing a variety of assistance to African countries to the best of its capabilities and supporting the economic and social development in Africa, which is obvious to the majority of African people.

China's importing of primary products from African countries is entirely in accordance with international practices and market rules. It can help to break the monopoly by Western countries and promoteAfrica's export diversification so thatAfrica can gain more benefits. In fact, China not only imports primary products but also more and more finished products from African countries. For example, it's reported by CCTV that there is African Commodities Trade Center in theYiwuChina Commodity City in Zhejiang Province where many African friends sell their characteristic finished products. The Chinese government has always attached importance to encouraging Chinese enterprises to use more local equipment and labor in their economic and trade cooperation with African countries. In recent years, increasing Chinese investment in African countries has contributed to the economic growth of the host countries, and increased the tax revenue, created a lot of jobs, and trained a large number of people for African countries. By the end of 2012, The total stock of Chinese direct investment had reached nearly US$ 20 billion, and

in 2012 alone, China's FDI in Africa was nearly US$ 3 billion. There are more than 2,000 Chinese enterprises investing and building factories in Africa and the areas of cooperation have expanded gradually from such traditional sectors as agriculture, mining, and construction to mineral processing, manufacturing, finance, commerce, real estate, and tourism. Some people say that Chinese companies are only developing mines and growing agricultural produce in Africa. The fact speaks differently. Chinese enterprises have expended their investment to manufacturing as well as various kinds of service industries. In 2012, Chinese tourists went to Africa totaled at 870,000 person/times. In order to encourage and support Chinese enterprises to invest in Africa, China has established the China-Africa Development Fund. In the past five years, the China-Africa Development Fund has invested $ 1.84 billion in 61 projects. China has also built six economic and trade cooperation zones in five African countries, where the experiences of the Chinese Development Zone are applied to host large numbers of Chinese companies. The focus is on the processing industry. The six economic and trade cooperation zones in African countries have provided more than 10,000 jobs.

China remains committed to developing trade and economic cooperation with Africa in the principle of equality, mutual benefit and common development. China always matches its words with its deeds.As China-Africa trade and economic cooperation continues its sound development, we believe thatmore and more African friends will come to a clearer and more objective understanding of the positive effects and contributions to Africa made by Sino-African cooperation. Thank you for your question.

CRI: According to some media reports, MOFCOM is the world's youngest mergers and acquisitions regulatory authority, and a regulator that is very easily influenced by political decisions, and that investors find it difficult to understand MOFCOM's positions.Uncertainties resulted from such non-transparency has led to windfall profits for some hedge funds. What's your view on this? Could you please brief us on MOFCOM's antimonopoly review work? Thank you.

ShenDanyang: We havenoticed such reports and comments. I think that these comments are totally groundless and are not fact-based. Since Anti-monopoly Law was formally put into effect in August, 2008, MOFCOM has worked for the promulgation of a serious of supporting laws and regulations covering both procedural aspects such as case filing and review and substantive aspects such as competition review in order to increase enforcement transparency and facilitateimplementation. Those laws and regulations, which provide guidance and convenience, are well known and well spoken of by enterprises and their counsels.

Meanwhile, when conducting anti-monopoly reviews on businessconcentration, MOFCOM strictly complies with the Anti-monopoly Law and other related laws and regulations in terms of both procedure and substance, assesses the impact on competition in accordance with the laws and then makes a decision. During the whole review process, MOFCOM always maintainsgood communications with the enterprises and their counsels. From when the Anti-monopoly Law took effect in 2008 to the end of 2012, MOFCOM received a total of 642 filings for concentration

review. Among them, 585 reviews were initiated, and 540 reviews were concluded. Among the concluded cases, 523 were unconditional approvals, accounting for 96.9% of the total, 16 were conditional approvals, and only one case was disapproved.

In 2012, MOFCOM received 207 filings for concentration reviews, initiated review on 188 cases, and concluded 164 cases. The numbers are at the same level as in 2011. Among the concluded cases, 6 were approved with conditions, 158 were unconditionally approved, accounting for 96.3% of the total, and there was no disapproval. In fact, MOFCOM's decisions on the cases are accepted and respected by the filing enterprises, and its enforcement efforts have been widely acknowledged and received positive comments. MOFCOM is now one of the world's most important law enforcement agencies in the field of concentration review. Thank you for your question.

China Daily: We noticed that China hasn't benefited much from exports according to UNCTAD's new calculation method based on global value chain. Previously, OECD and WTO also reached a similar conclusion using value added estimates. We'd like to hear MOFCOM's comments on it. How shall China's trade imbalance with major economies be viewed from such a perspective? Thank you.

ShenDanyang: WTO, OECD and UNCTAD have put forward in recent years a new concept called "global value chain", which is designed to use value-added trade statistics to measure global trade, and aims to demonstrate the actual international trade pattern in the context of economic globalization and international labordivision, and reflect more accurately the benefits

different countries gainfrom global trade. China has been actively participating in and promoting such studies. In September last year, we co-organized a symposium on this topic in Beijingwith these three organizations.

The current statistical method of international trade calculates the total export value of a product into the export value of the country where the final stage of processing takes place. China has a bigprocessing trade. Based on such a method, the values of semi-finished products and raw materials, regardless of where they come from, are all calculated as part of China's total export value simply because the final processing takes place in China. Such a method doesn't exclude the value added by other countries, and results in overestimates by a large margin of the export value of the final exporting country.

Generally speaking, the export value of a country engaged in product assembly and at the lower end of the global value chain is often vastly overestimated, while that of the country providing parts and components and at the middle of the global value chain is often severely underestimated. According to the studies done by China, China's trade surplus with the US in 2011 was US$202.4 billion when calculated using traditional gross trade value statistics. However, that figure would drop to US$92.6 billion when calculated using added value statistics, down by 54.2%. According to the studies by OECD and WTO, China's trade surplus with the U.S. in 2009 would drop 25% from US$176 billion to US$132 billion by switching from the traditional method to the new method.

Chinese and international experts tend to agree that advancing the studies on global value chain and added value can help to objectively reflect a nation's real trade relations with its major trading partners, as well as the actual scale of its foreign trade, the impact of foreign trade on domestic economic development and employment, the international competitiveness of its industries and where the industries stand in the global value chains. It can also help to point out the right direction for industrial restructuring and upgrading.

There are still on-going studies on global value chain and added value, and no uniform standards and rules have been established. MOFCOM will continue to cooperate with international organizations and China's major trading partners, and promote the further development of relevant studies. Thank you for your question.

ShenDanyang: That concludes today's press conference. Thank you.

SELECTED FILINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DIPLOMATIC NOTE FROM THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UNITED STATES DEPARTMENT OF STATE, DATED APRIL 9, 2014

EMBASSY OF THE PEOPLE'S
REPUBLIC OF CHINA
3505 International Place, N.W.
Washington, D.C. 20008

CE027/14

The Embassy of the People's Republic of China presents its compliments to the Department of State of the United States of America and has the honor to inform the latter that the Chinese Government would like to call upon the U S. Administration to note an appeal now pending in the United States Court of Appeals for the Second Circuit, No. 13-4791. In this case, two Chinese companies appeal from a judgment rendered by the U.S. Federal District Court in the Vitamin C Antitrust Litigation.

China has attached great importance to this case. The Chinese Ministry of Commerce submitted an amicus brief to the U.S. Federal District Court in June 2006. This brief, and two subsequent statements submitted by the Chinese Ministry of Commerce, described China's compulsory requirements concerning vitamin C exports and explicitly notified the U.S. Federal District Court that the conduct of the Chinese enterprises is a result of their obligations

to comply with Chinese law requirements, instead of a conduct of their own volition.

China takes note that, according to U.S. law and judicial practice, a statement by a foreign government concerning its own domestic law must be regarded as "conclusive" in U.S. courts, or at least treated with considerable deference and respect. The U.S. Federal District Court stated, however, that it would not defer to the statements of the Chinese Ministry of Commerce and would instead make its own independent assessment of Chinese law. Based on this independent assessment, the U.S. Federal District Court determined, incorrectly, that defendants' conduct was voluntary.

The resulting judgment is contrary to the "foreign sovereign compulsion" doctrine of U.S. antitrust law, which provides complete immunity for acts committed within the borders of another sovereign if such acts are compelled by the laws of that sovereign, and is contrary to the act of state doctrine and international comity principles as well.

China calls upon the U.S. Administration to take note that the Chinese Ministry of Commerce will file an amicus brief to the Court of Appeals once more to reiterate the positions it stated regarding this litigation and to assist the Court of Appeals' consideration of the case. The Chinese Government urges the U.S. Administration also to file a brief in the Court of Appeals in support of China's positions. U.S. counsel for the Chinese Ministry of Commerce, located in Washington D.C., also has prepared a memorandum to assist the U.S. Administration in its consideration of this case.

The Embassy of the People's Republic of China avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, DC, April 9, 2014

Department of State
United States of America
Washington DC

No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether a court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to accept as legally binding a submission from a foreign government characterizing its own law.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees in the court below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corp., defendants-appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Animal Science Products, Inc. states that it has no parent company, and no publicly-held company owns 10% or more of its shares. Petitioner The Ranis Company, Inc. states that it has no parent company, and no publicly-held company owns 10% or more of its shares.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 837 F.3d 175. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 39a) denying Respondents' renewed motion for judgment as a matter of law is unreported but available at 2013 WL 6191945. The District Court's opinion denying Respondents' motion for summary judgment (Pet. App. 54a) is reported at 810 F. Supp. 2d 522. The District Court's opinion denying Respondents' motion to dismiss (Pet. App. 157a) is reported at 584 F. Supp. 2d 546.

JURISDICTION

The Court of Appeals entered judgment on September 20, 2016, and denied rehearing on November 4, 2016. On January 3, 2017, Justice Ginsburg extended the time to file a petition for certiorari to April 3, 2017. The petition for certiorari was filed on April 3, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

STATEMENT OF THE CASE

This case concerns the authority of the federal courts to decide whether or not to accept an interpretation of foreign law offered by a foreign government when an arm of that government appears in court as *amicus curiae*. Prior to the decision below, the prevailing rule granted substantial deference to foreign sovereign legal submissions, but left courts wide discretion to scrutinize those submissions in order to ensure the accurate application of foreign law. Departing from that consensus, the Second Circuit held that federal courts are "bound to defer" to an appearing foreign sovereign's characterization of its own law. There is no legal basis for such a standard. Adopting it would threaten judicial independence, invite inaccurate applications of foreign law, and allow the enforcement of U.S. laws to turn on the whims of foreign governments that have every incentive to shield their citizens and companies from liability in U.S. courts.

Petitioners brought this antitrust class action on behalf of two classes of U.S.-based direct purchasers of vitamin C, alleging that Respondents and their co-conspirators fixed prices and restricted supply in their exports of vitamin C to the United States. Respondents' only defense was that Chinese law had required them to violate the U.S. antitrust laws, and therefore that the doctrines of foreign sovereign compulsion, act of state, and international comity required dismissal of the complaint.

Respondents' central claim—that Chinese law compelled them to fix prices—has always been false. The Chinese government regulated export prices and

volumes for vitamin C in the past, but it ceased doing so by the end of 2001 to facilitate China's entry into the World Trade Organization. The governing documents adopted in 2002 describe a system of voluntary industry coordination, and both the Chinese Government and the participants in the scheme sang the same tune prior to this litigation.

After this suit threatened China's leading vitamin C producers with U.S. antitrust liability, the Chinese Ministry of Commerce changed its story. Participating in a joint defense agreement with Respondents, the Ministry filed an *amicus* brief at the motion-to-dismiss stage asserting that Chinese law had compelled Respondents to fix prices and output. Two different district judges held that the Ministry's brief was entitled to "substantial deference," but was not conclusive because it failed to explain critical regulatory authorities, departed from the Ministry's own source materials and prior statements of the Chinese government, and could not be squared with Respondents' contemporaneous statements describing the governing legal regime.

The Second Circuit reversed based entirely on the Ministry's *amicus* brief. The panel held that the District Court's "careful and thorough treatment of the evidence before it . . . would have been entirely appropriate," Pet. App. 30a n.10, but for the Ministry's appearance in the litigation, which by itself convinced the panel that it was "bound to defer" to the Ministry's characterization of Chinese law.

This Court should reverse the Second Circuit's rigid and arbitrary deference rule. Courts do not surrender their duty or discretion to interpret foreign law

accurately simply because a foreign sovereign appears with an *amicus* brief. The District Court's respectful but inquisitive approach was correct.

A. Factual History

1. In the late 1990s, parallel private and government investigations revealed a now infamous cartel of thirteen European and Japanese vitamins manufacturers that had run a decade-long conspiracy to fix the prices of twelve different vitamin products, including vitamin C. It was, according to the Justice Department, "the most pervasive and harmful criminal antitrust conspiracy ever uncovered by the [Antitrust] Division."[1] *See* Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust L.J. 711, 712-19 (2001).

In the early 1990s, a sub-cartel of four vitamin C producers—F. Hofmann-La Roche AG, BASF AG, Merck KgaA, and Takeda Chemical Industries Ltd.—controlled global vitamin C prices and supply. Commission Decision No. 2003/2 of 21 November 2001, 2003 O.J. (L 6) 1, 38-45 (EC).[2] Starting in the mid-1990s, Chinese vitamin C producers began to take advantage of lower manufacturing costs to challenge the cartel—ultimately, the Chinese companies replaced the cartel as the dominant player in the global market. Pet. App. 56a; Expert Report of B. Douglas Bernheim,

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[1] *Selected Criminal Cases, Antitrust Division*, U.S. Dep't of Justice, https://www.justice.gov/atr/selected-criminal-cases-antitrust-division.

[2] http://data.europa.eu/eli/dec/2003/2(1)/oj.

Ph.D., at 14, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y. Nov. 23, 2009), ECF No. 397-3 ["Bernheim Report"].

2. In late 1997, Chinese trade authorities instituted a new regulatory regime for Chinese vitamin C production and export. China's Ministry of Commerce (the "Ministry")[3] issued a regulation known as the "1997 Notice," JA89-97, which declared that "[t]he scale of Vitamin C production shall be strictly controlled," JA90, and required the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (the "Chamber") to establish a "Coordination Group" of vitamin C producers, JA92. That group became known as the "Vitamin C Subcommittee." The 1997 Notice required vitamin C companies to be members of the Subcommittee in order to export, and further required the Subcommittee to coordinate prices and output. JA92. Under the 1997 Notice, the Subcommittee could penalize any "enterprises competing at low price," JA92, by reducing export quota or revoking the violator's right to export. JA93.

The Vitamin C Subcommittee passed its first governing charter in late 1997 (the "1997 Charter"). JA81-88. The 1997 Charter provided that "[o]nly the members of the Sub-Committee have the right to export Vitamin C," JA83, and obligated members to "[s]trictly execute" the agreed-upon export price and

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[3] At this time, the Ministry of Commerce, or "MOFCOM" was still known by its former name, the Ministry of Foreign Trade and Economic Cooperation, or "MOFTEC." *See* Pet. App. 190a n.1.

keep it confidential. JA85. The 1997 Charter also authorized penalties in the event a member violated the Charter, including "warning, open criticism, and even revocation of its membership" in the Subcommittee, and "suspen[sion] and even cancel[lation of] the vitamin export right of such violating member." JA85-86.

Between May 2000 and December 2001, despite the purportedly strict provisions of the 1997 regime, Chinese vitamin C exporters relied upon market prices to engage in a sustained "price war," which resulted in the collapse of the export price of vitamin C from $5.0/kg to $2.8/kg. JA108. An internal report prepared by one of Respondents' co-conspirators lamented that throughout 2001, the Chinese vitamin C market was characterized by "brutally sharp competition, slacked performance, and sustained price decline." JA521.

By 2001, Chinese vitamin C producers had consolidated from more than twenty companies to the four "major manufacturers" who, along with their corporate affiliates, were the original defendants in this case. Pet. App. 159a.[4] Alongside this consolidation,

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[4] Those four manufacturers were Respondent Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome,"); and defendants Jiangsu Jiangshan Pharmaceutical Co. Ltd. ("JJPC"), later known as "Aland Neutraceutical Co., Ltd.," Pet. App. 54a; Northeast Pharmaceutical Group Co. Ltd. ("NEPG"); and Weisheng Pharmaceutical Co. Ltd. ("Weisheng"). Pet. App. 159a. During the class period—December 1, 2001 to June 30, 2006—these four companies constituted the corporate membership of the Vitamin C Subcommittee's "Council," its primary power-center and the "enforcement body" charged with implementing the Subcommittee's resolutions. JA197, JA189.

China's market dominance grew—by 2002, they accounted for more than 80% of vitamin C exports to the United States. Bernheim Report ¶ 43.

3. The internal price war within the vitamin C industry led the Subcommittee, including Respondents, to meet in November 2001, when they agreed to raise the export price of vitamin C to $3/kg, effective January 1, 2002. Pet. App. 79a. Contemporaneous accounts stated that Respondents reached this agreement voluntarily because "prices had reached rock bottom, and no one could sustain a further slide," and that the industry had acted on its own "because the country had opened up the commercial products business from a free competition aspect." Pet. App. 80a; Pet. App. 79a-82a. The Chamber announced the agreement on its website, stating that the Subcommittee members

> *were able to reach a self-regulated agreement successfully*, whereby they would *voluntarily control* the quantity and pace of exports to achieve the goal of stabilization while raising export prices. Such *self-restraint* measures, mainly based on 'restricting quantity to safeguard prices, export[ing] in a balanced and orderly manner and adjust[ing] dynamically' *have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention.*

Pet. App. 173a-174a; JA109.

4. In 2002, China fundamentally reshaped the legal regime governing vitamin C exports. These changes were part of a larger deregulation project aimed at

advancing China's transition to a market economy in gaining entry into the World Trade Organization.

Among other reforms, the Ministry abolished the 1997 Notice. In its place, the Ministry issued a new "2002 Notice" that abolished the 1997 regime's key mandates, including (1) that "the scale of Vitamin C production shall be strictly controlled," (2) that the vitamin C Subcommittee must fix prices and output, (3) that all vitamin C exporters participate in and "subject themselves to the coordination of" the Subcommittee, and (4) that the Subcommittee penalize any "enterprises competing at low price and reducing price through any disguised means." *Compare* JA90-92 (1997 Notice), *with* JA98-101 (2002 Notice).

The 2002 Notice also instituted a new procedure for monitoring vitamin C exports called "price verification and chop." JA100. On paper, "verification and chop" required exporters to submit vitamin C export contracts to the Chamber, which was then supposed to affix a seal (or "chop") if the contract met or exceeded an industry-determined minimum export price. JA104-06. The exporter would then present the contract to Customs, which was supposed to permit only those export contracts with an affixed "chop." JA103. But the Notice did not prohibit exports in the event that the Subcommittee members declined to reach a price agreement in the first place. JA98-101. Further, the 2002 Notice made no mention of requiring or enforcing output restrictions. JA98-101.

Even on the face of the 2002 Notice, participation in verification and chop gave the Chamber's members the discretion to opt-out. Specifically, the Notice provided that "[g]iven the drastically changing international

market, the customs and chambers *may suspend export price review for certain products*" with approval of the relevant subcommittee. JA100 (emphasis added).

The Subcommittee, for its part, repealed and replaced the 1997 Charter with a new "2002 Charter." JA182-97. The 2002 Charter differed radically from its predecessor: it declared that the Subcommittee was an "organization jointly established on a *voluntary* basis," JA182 (emphasis added), eliminated the 1997 Charter's requirement that Subcommittee members "[s]trictly execute" the "coordinated price" set by the Chamber, JA182-97, and granted all members an express "[r]ight" to "freely resign from the Subcommittee," JA186. *See* JA593-98 (testimony of Qiao Haili, head of the Vitamin C Subcommittee, confirming those changes).

China's contemporaneous statements to the WTO confirmed that the new 2002 regime had repealed government-mandated vitamin C export price- and output-restrictions as part of a broader effort to liberalize and reform China's economy. Significantly, China represented to the WTO that, as of January 1, 2002, it "*gave up export administration of . . . vitamin C*." JA319 (emphasis added). In the same statement, China explained that it would still "maintain[] export administration of a small number of products," but vitamin C was *not* one of those products. JA319.

5. Consistent with the reforms to the Subcommittee Charter, the contemporaneous evidence showed that the Chinese Government did not force vitamin C exporters to manipulate prices or export volume after 2002.

a. Exporters decided and implemented prices independent of government direction or intervention. Qiao Haili, head of the Vitamin C Subcommittee, admitted in sworn testimony that it was "accurate" that "export prices are fixed by enterprises *without* government intervention," CAJA A1811; Pet. App. 293a (emphasis added), and further that, "on the whole, the government did not involve itself in price fixing," CAJA A1811. Meeting minutes documenting Respondents' voluntary price and output agreements showed no indicia of government compulsion. *See* CAJA A2161-A2162 (memorializing price and production agreement with no mention of legal requirement); JA407 (same); JA180-81 (same); CAJA A2100 (same); CAJA A2105-A2109 (same). Specifically as to price, the Chamber in 2003 distributed a list of agreed-upon export prices for certain key commodities, JA398-400, requesting that Chamber members "[p]lease abide by the list in implementation." JA398. While vitamin C was included on the price list, the column for "agreed price" was left blank. JA399. In contrast, each of the other "key commodities" had an "agreed price" listed. JA399.

b. When Respondents reached price agreements, compliance with those agreements was entirely voluntary—exporters routinely sold at prices both below and above the purportedly-mandatory floors. CAJA A2091-A2098 (even though the verification and chop price was $3.35, Respondents reached agreements to charge *higher* prices during the class period); JA491-92 (exporters "felt free to quote prices lower than the agreed floor price" of $9.20/kg, which made the effect of the price floor "very limited"); JA407 (exporters knew that the price limitation would have a "very limited"

effect because everyone went below it); JA512 (companies "were able to sell vitamin C for less than the verification and chop price . . . because of the highs and lows of the pricing"); JA550 (the Chamber's "price could not be implemented" when there was "a big fluctuation" and the price floor "was not consistent with the market price"); JA535-36 (Weisheng sold vitamin C in the U.S. at prices "less than the minimum price of $3.35," because "by that time $3.35 was not the market price").

c. The verification and chop process was not treated as mandatory. For example, contracts Respondents produced revealed that virtually all of the exports to the U.S. in the class period were shipped without a chop. JA512-17; CAJA A2267-A2539, A2565-A2970, A3020-A3375, A3431-A3669.

d. Exporters faced no sanctions for exporting at independently-determined prices, or for misrepresenting price levels in their contracts. JA501 (witness from a co-conspirator admitting that "[n]obody's going to force" the exporters to "go along with the common understanding"); Pet. App. 249a (Qiao admitting that "[n]o company was ever punished for charging less than $3.35.").

e. Output was not regulated by the Ministry or Chamber at all after 2001. JA182-97. Instead, Respondents coordinated output restrictions by agreement when doing so was convenient, and by 2003, the Chamber had abandoned even the pretense of regulating output. JA526 (in a 2003 meeting, it was decided that "there would be no limits on volume of vitamin C"); JA581 (the Chamber "did not use

verification and chop" or provide "any directions at all" for export volume between March 2003 and July 2006).

6. The leadership of the Chamber acknowledged in contemporaneous writings that Respondents' cartel behavior was voluntary. In a 2003 memo addressed to the Ministry, Qiao bragged that industry "self-regulation" had increased vitamin C exports, but further observed:

> Building a credibility system cannot be separated from industry self-regulation and the industry's self-regulation can't do without the chambers of commerce. However, the legal standing of chambers of commerce is still not clear. Regulations and rules formulated by companies in the industry organized by the chambers of commerce lack legal basis and are difficult to gain support from government departments. These rules and regulations simply become formality and only 'honest fellows will follow.' Therefore . . . we need legislation to define the legal status of the chambers of commerce. We also need support from relevant government departments to assist chambers of commerce in asserting their authority, so that [the chambers] can punish companies who engage in smuggling, tax evasion or who have little credibility, and can honor those who are trustworthy, thereby creating an environment for a credibility industry.

JA454-55.[5]

By 2004, the Chamber and Subcommittee could not count on all Chinese producers and exporters of vitamin C being members under the 2002 Notice and Charter. JA182-97. Vitamin C exporters described the governing regime of "self-regulation" as a series of "gentlemen's agreements." JA384. A Chinese official said in a 2005 speech that although "the [vitamin C] enterprises, mediated by [the Chamber], took measures last year to limit production to protect price and to ensure a 'soft-landing' of the price plunge, but in the long run, such allegiance is vulnerable and will easily succumb to the temptation of profit . . . ." JA409.

7. Respondents' post-filing conduct also supported the district court's conclusion that the anticompetitive conduct was voluntary. After Petitioners filed their complaint in January 2005, the Subcommittee decided to stop keeping records of their meetings, and then *stopped meeting altogether*—despite the supposed legal requirement that they meet to coordinate prices and output. JA592; CAJA A1712. Other evidence suggested that the compulsion defense was manufactured in

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[5] At trial, Qiao claimed for the first time (in a radical departure from his deposition testimony) that this memo referred to a breakdown of coordination in the penicillin industry. That claim was shown to be fabricated, not just because of Qiao's failure to mention penicillin at any point during his deposition, or the memorandum's failure to mention the word "penicillin" even once, but also because the industry breakdown to which Qiao referred did not occur until *months after* he had written his memorandum. JA601-03.

response to the litigation: an employee of one of the conspiring companies wrote in a November 2005 email that, "[e]ven if we lost the case, government would take the foremost part of the responsibility. After all, *we need to do many things in a more hidden and smart way*." Pet. App. 88a n.19.

B. **Procedural History**

1. On January 26, 2005, Petitioners filed a complaint against Respondents and several co-conspirators in the Eastern District of New York. JA52. The Joint Panel on Multidistrict Litigation consolidated two other pending actions with Petitioners' and assigned the consolidated action to Judge David Trager in the Eastern District. JA13.

2. Respondents moved to dismiss based on the doctrines of act of state, foreign sovereign compulsion, and international comity. Pet. App. 6a. In support of that motion, the Ministry filed an *amicus* brief asserting that Chinese law had compelled Respondents' conduct. Pet. App. 190a. The Ministry described itself as the "highest administrative authority in China authorized to regulate foreign trade," and "the equivalent in the Chinese governmental system of a cabinet level department in the U.S." Pet. App. 190a. The Ministry made no representation that it had authority to *interpret* Chinese law.

The Ministry asserted that the Chamber's system of "self-regulation" was the product of a "regulatory pricing regime mandated by the government of China." Pet. App. 197a. For these propositions, the Ministry cited repeatedly to an outdated 1991 regulation, as well as the 1997 Charter, which the Ministry failed to

disclose had been repealed. Relying on the repealed 1997 Charter, the Ministry misleadingly asserted that "only Sub-Committee members 'have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota.'" Pet. App. 202a-203a. The Ministry's brief cited additional provisions of the 1997 Charter as though they were still in force, including repealed penalties for noncompliance with Subcommittee directives and, "[m]ost significantly for purposes of this case," the (abolished) obligation to "'*[s]trictly execute export coordinated price set by the Chamber and keep it confidential.*'" Pet. App. 203a (emphasis in original). In sum, the Ministry failed to disclose that its legal theory relied upon regulatory provisions that were defunct by 2002.

The Ministry submitted the repealed 1997 Charter, but *not* the 2002 Charter, as an exhibit to its *amicus* brief, and neither the Ministry nor Respondents disclosed the existence of the 2002 Charter to the court. Instead, the Ministry's brief erroneously asserted that the 2002 transition to "verification and chop" was a continuation of the earlier mandatory price and output regime. In characterizing the "verification and chop" regime, the Ministry relied only on those authorities it deemed helpful to its argument, such as the 2002 Notice and a separate 2003 Ministry "Announcement," but declined to mention or explain either the 2002 Charter or the 2002 Notice's provision that gave the Subcommittee the power to suspend price review. Pet. App. 208a-209a; JA98-101.

After Petitioners filed their opposition to Respondents' motion to dismiss, the Ministry filed another statement with the court. JA131. In that statement, the Ministry repeated that it had

"specifically charged the [Chamber] with the authority and responsibility, subject to Ministry oversight, for regulating, through consultation, the price of vitamin C manufactured for export," JA133, but omitted any reference to any regulatory authority, and failed to cite a single instance of government-mandated price-fixing. Further, the Ministry's statement made no mention of output restrictions, even in the abstract. The Ministry continued to omit any mention of the 2002 Charter. JA131-33.

3. After reviewing the Ministry's *amicus* briefs, documentary submissions, and some limited discovery, the District Court denied Respondents' motion to dismiss. Pet. App. 188a. The court considered evidence including post-2002 documents showing that the Subcommittee members reached several voluntary agreements on price, and occasionally defected from those agreements without suffering any penalty. Pet. App. 175a-176a. The court also reviewed testimony from "the person responsible for negotiating export contracts" for one of the defendants who "suggest[ed] that the hand of government was not weighing as heavily on defendants as defendants and the Ministry would have th[e] court believe." Pet. App. 176a-177a. And the court reviewed the email from Wang Qi (of co-conspirator JJPC), in which he mused that in light of the pending lawsuit, the defendants needed to act "in a more hidden and smart way." Pet. App. 178a.

The District Court recognized that the "authority of the Ministry's brief [was] critical to defendants' motion" to dismiss. Pet. App. 179a. The court concluded that the Ministry's brief was "entitled to substantial deference, but [would] not be taken as conclusive evidence of compulsion, particularly where,

as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." Pet. App. 181a. The court explained that "the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions," and, accordingly, denied the motion to dismiss. Pet. App. 186a & n.12.

4. Following the close of discovery, Respondents renewed their compulsion, act of state, and comity defenses in a motion for summary judgment. Pet. App. 55a.[6] The Ministry filed yet another statement (the "2009 Statement"), this time asserting without citations that "[d]uring the relevant period in the present case, the Ministry required vitamin C exporting companies to coordinate among themselves on export price and production volume," and that "[n]o vitamin C exporter could ignore these policies" lest they face "penalties for failure to participate in such coordination." JA249-50. The statement characterized China's statements to the WTO as mere "*general descriptions* of the current status of China's market economy" that had nothing to do with vitamin C, JA250, but declined to explain the portion of China's WTO statement that explicitly referenced vitamin C exports, JA319.

The District Court denied the motion for summary judgment. Pet. App. 56a. Considering Respondents' comity defense, the court concluded that dismissal

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[6] By this time, Judge Trager had passed away, and the consolidated action had been reassigned to Judge Brian M. Cogan. Pet. App. 58a n.4; JA34.

would not be justified under *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), "[u]nless [Respondents'] price-fixing was compelled by the Chinese government" creating a "true conflict" with U.S. law. Pet. App. 102a-103a.

On the question of Chinese law, the District Court carefully considered the Ministry's motion-to-dismiss-stage *amicus* brief and 2009 Statement. Pet. App. 118a-122a. The court found that the Ministry's statements were entitled to respect, and deferred to the Ministry's "explanation of the relationship between the Ministry and the Chamber." Pet. App. 118a-119a & n.37. But the District Court declined to grant conclusive deference to the Ministry's submissions, because they contained gaps and ambiguities, and failed to address "critical provisions" of the relevant legal regime. Pet. App. 119a. The court also found that certain of the Ministry's statements were directly contradicted by the documentary evidence before the court. Pet. App. 121a-122a.

The court found the Ministry's 2009 Statement to be "particularly undeserving of deference" because the statement: (1) failed to cite to any regulatory or statutory sources "to support its broad assertions about the regulatory system governing vitamin C exports"; (2) "contain[ed] numerous ambiguous terms and phrases, particularly with regard to the penalties under self-discipline"; and (3) failed to offer any explanation of the differences between the 1997 and 2002 regimes. As such, the Ministry's statement did "not read like a frank and straightforward explanation of Chinese law," but rather "like a carefully crafted and phrased litigation position." Pet. App. 119a-120a.

The District Court also noted that the Ministry made "no attempt to explain China's representations [to the WTO] that it gave up export administration of vitamin C, which appear to contradict the Ministry's position in the instant litigation." Pet. App. 120a-121a. The court further noted that "the factual record contradicts the Ministry's position," including evidence relating to departures from price floors and production agreements. Pet. App. 121a. In sum, the court concluded that the Ministry's legal position appeared to be a "post-hoc attempt to shield [Respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period." Pet. App. 121a-122a.

Having declined to treat the Ministry's submissions as conclusive, the District Court relied on "what may be considered the more traditional sources of foreign law—primarily the governmental directives themselves as well as the charter documents of the [Vitamin C] Subcommittee and the Chamber"—in reaching a Rule. 44.1 determination "that the [post-2001] regime did not compel [Respondents'] conduct." Pet. App. 119a.

5. Trial was held over three weeks in 2013. JA478-603. After the close of evidence, Respondents made an oral Rule 50(a) motion for judgment as a matter of law, in which they pressed their act of state and foreign sovereign compulsion defenses (but omitted their comity defense). Pet. App. 250a-275a; Pet. 15. The District Court denied judgment as a matter of law on each ground. Pet. App. 273a-275a.

The jury found for Petitioners and awarded $54.1 million in damages before trebling.[7] Pet. App. 276a-279a. In a special verdict, the jury found that Respondents had failed to prove that their conduct had been "actually compelled" by the Chinese government during the class period of December 1, 2001 to June 30, 2006. Pet. App. 278a.

Respondents moved again for judgment as a matter of law, this time on the grounds that the act of state, foreign sovereign compulsion, and international comity doctrines barred liability. Pet. App. 41a. The District Court denied that motion. Pet. App. 53a.

6. Respondents appealed, pressing the same three arguments. The Ministry filed another *amicus* brief in which it asserted for the first time, and without any supporting citation, that it "has unquestioned authority to interpret applicable Chinese law." Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China at 14 ("2014 Ministry Amicus Br."), Dkt. 105, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014). The Ministry again failed to discuss the substantive content of the 2002 Charter, but for the first time attempted to justify this omission by saying that "[the Ministry's] reliance on its own regulation rather than a statement promulgated by its subordinate simply reflects [the Ministry's] legal view

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[7] Defendants Weisheng and NEPG settled prior to trial, and defendant JJPC settled during trial. The court eventually entered final judgment in an amount of approximately $147.8 million against Respondents. *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y), ECF Nos. 816, 834.

that its own regulatory act was key," *id.* at 26—eliding the fact that the Ministry had previously relied heavily on the *repealed* version of its "subordinate's" statement (the 1997 Charter) in its *amicus* brief before the District Court. *Supra* at 15-16; Pet. App. 202a-203a.

The Ministry also argued for the first time that China's 2002 statement to the WTO referred only to "export quotas and licenses," and, separately, that "the United States adopted exactly the same position in WTO dispute settlement proceedings that MOFCOM has urged in this case: after 2002, China was still requiring exporters to abide by a price-setting regime." 2014 Ministry Amicus Br. at 28. But this claim, too, was misleading. At the proceeding in question, the United States had accused China of maintaining a system of "minimum export pricing" specifically over "bauxite, coke, fluorspar, manganese, magnesium, silicon carbide, yellow phosphorus, and zinc," but *not* vitamin C. Opening Oral Statement of the Complainants, *China—Measures Related to the Exportation of Various Raw Materials*, DS394/DS395/DS398, ¶ 31 (Aug. 31, 2010).[8]

Ignoring the trial that had occurred, the Second Circuit reversed the District Court's initial order denying Respondents' motion to dismiss, and remanded with instructions to dismiss Petitioners'

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[8] https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/Jt.Oral1_.as%20delivered.fin_.(pdf%20version).pdf

complaint with prejudice. Pet. App. 3a.[9] The panel acknowledged that the Sherman Act applied to Respondents' price and output restraints, but also noted that Respondents could not have complied with U.S. antitrust law if, as the Ministry had claimed, Chinese law required Respondents to "fix the price and quantity of vitamin C sold abroad." Pet. App. 19a. Given that the "2002 Notice does not explicitly mandate price fixing," the panel explained that "[o]ur interpretation of the record as to Chinese law thus hinges on the amount of deference that we extend to the Chinese Government's explanation of its own laws." Pet. App. 19a-20a.

The panel held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is *bound to defer* to those statements." Pet. App. 25a (emphasis added). Despite that holding's apparent qualifications, the panel did not explain how the "reasonableness" of the Ministry's statement was to be

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[9] Even though the Second Circuit purported to confine its review to the motion-to-dismiss record, Pet. App. 2a-4a nn.2-3, this Court's review is not so limited. On appeal from Respondents' post-trial motion for judgment as a matter of law, the appropriate record is the full record as developed through discovery and trial. *See Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the [interlocutory] motion," and "at that stage" and on appeal, a "defense must be evaluated in light of the character and quality of the evidence received in court.").

assessed, declined to examine contradictory evidence in the record undermining the statement's reasonableness, made no finding that the Ministry's *amicus* brief constituted a "sworn evidentiary proffer," and ignored whether the Ministry was an authoritative interpreter of Chinese law. Pet. App. 25a, 27a-33a.

Instead, the panel applied a legal standard that turned on the bare fact of the Ministry's appearance in the litigation. The panel explained that "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate." Pet. App. 30a n.10. But because the Ministry had appeared, the panel held that the *amicus* brief was conclusive as to the meaning of Chinese law. Even so, at no point did the panel explain how its finding of compulsion with respect to price fixing applied to, and therefore required dismissal of, Petitioners' claims based upon output restrictions.

Having found a "true conflict" between Chinese and U.S. law, the panel performed a cursory analysis of the remaining comity factors. Pet. App. 33a-37a. The panel found that the relevant parties and claims were in China, that relief would be ineffective given China's insistence that its companies engage in anticompetitive conduct, and that the jury verdict risked upsetting U.S.-China relations. *Id.* The panel did not weigh the interests of U.S. businesses (including Petitioners) and consumers, the interests of the United States in enforcing its antitrust laws, or the Executive Branch's failure to corroborate China's claims in the case.

7. Petitioners sought panel rehearing and rehearing *en banc*, arguing among other things that the panel had erred in granting conclusive deference to the Ministry's *amicus* brief, and in only reviewing (after a full trial on the merits) the District Court's interlocutory order denying Respondents' motion to dismiss. Pet. App. 280a-297a. The Second Circuit denied rehearing and rehearing *en banc*. Pet. App. 298a. Following briefing on the petition for certiorari, including a recommendation by the Solicitor General to grant the petition, this Court granted review limited to the second question presented. Misc. Order (Jan. 12, 2018).

SUMMARY OF ARGUMENT

There is no legal basis for requiring federal courts to accept as legally binding an appearing foreign sovereign's characterization of its own law. Mandating that courts grant binding deference to any particular source is the antithesis of the broad discretion Rule 44.1 commits to courts, and the arbitrary nature of the Second Circuit's rule would interfere with courts' ability to reach accurate determinations of foreign law. No precedents from this Court, alternative deference doctrines, or international norms support the adoption of such a standard.

I. As a threshold issue, a standard of binding deference cannot be squared with Rule 44.1, which was designed to afford federal courts maximum flexibility in determining foreign law. Rule 44.1 protects federal courts' discretion by instructing courts to treat the determination of foreign law as a legal question, and by permitting courts to "consider any relevant material or source." The Second Circuit's binding deference

standard undermines each of these principles. A court cannot meaningfully consider and resolve a question of foreign law if it is forbidden from questioning or challenging a foreign government's legal statement. Nor is there any legal justification for mandating that U.S. courts adopt interpretations of foreign law that, while reasonable on their face, prove on close examination to be unpersuasive or inaccurate.

II. A standard of binding deference standard does not follow from any prior decision of this Court or other legal authority. Specifically, the panel's reliance on this Court's decision in *United States v. Pink* was misguided. *Pink* is a narrow decision that did not adopt a broad prospective rule of deference. Moreover, *Pink* was primarily concerned with protecting the Executive Branch's foreign policy prerogative against state intrusion—a concern not implicated here.

A binding deference standard further conflicts with principles of international comity and settled international practice. Foreign courts, as well as the operative international treaties that speak to the issue, universally give preference to accuracy over respect for a statement's advocate. The Second Circuit's standard abandons the principle of accuracy by demanding that U.S. courts accept foreign legal statements even when scrutiny reveals that statement to be unpersuasive or inaccurate.

III. The deference that the federal courts have traditionally afforded to federal and state administrative agencies counsels against the adoption of a binding deference standard. Further, the analogy to this Court's decisions in *Chevron* and its progeny does not support such a standard. *Chevron* deference is

rooted in separation-of-powers concerns, which are absent in the relationship between the judiciary and foreign government agencies. Even if *Chevron* were instructive, the deference it counsels is more nuanced and less stringent than what the Second Circuit's standard would require. *Chevron* carves out a gatekeeping role for courts to decide whether deference is legally appropriate, but that inquiry would be prohibited by the Second Circuit's standard. And while *Chevron* doctrine permits courts to challenge an agency's "convenient litigation position," the Second Circuit's rule would forbid such a conclusion as offensive to comity. An attempt to analogize to federal-court deference to state agencies leads to the same conclusion—the ordinary standards applied are far less deferential to states than the Second Circuit's rule is to foreign governments.

IV. In the absence of blind deference to the Ministry's *amicus* brief, no court could plausibly hold that Chinese law required Respondents to engage in price fixing and output restrictions. Only if all of Respondents' unlawful conduct was compelled under Chinese law would dismissal pass this Court's threshold "true conflict" inquiry in *Hartford Fire*. 509 U.S. at 798-99. Given the lack of any such conflict, the District Court's judgment should have been affirmed.

ARGUMENT

I. A Binding Deference Standard Conflicts with the Federal Courts' Discretion and Responsibility to Reach an Accurate Determination of Foreign Law Under Rule 44.1.

Consistent with the judiciary's independent role as the authoritative interpreter of law in our constitutional order, Federal Rule of Civil Procedure 44.1 provides courts broad discretion to reach an independent determination of foreign legal issues by reference to "any relevant material or source." The Court of Appeals' "binding deference" standard would turn Rule 44.1 on its head by privileging foreign sovereign submissions above all other sources of foreign law, without respect to the accuracy, merit, or persuasiveness of the submission. Granting binding deference to foreign sovereigns' legal statements would therefore degrade the accuracy and independence of foreign-law determinations, and undermine the enforcement of a host of U.S. laws. That result finds no support from the text or purpose of Rule 44.1, or any of this Court's precedents.

A. Rule 44.1 Protects Courts' Substantial Discretion to Reach an Independent and Accurate Determination of Foreign Law.

1. Rule 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." The Rule was adopted "to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of

a foreign country." Fed. R. Civ. P. 44.1 advisory committee's notes (1966) (Adoption).

Prior to the enactment of Rule 44.1, foreign law was considered to be a question of fact that had to be alleged and proved by the parties. *See Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 397 (1949); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 38 (1801). Courts were generally at the mercy of parties' submissions, and the resulting determinations could only be as accurate as the materials provided. Meanwhile, if a party alleged but failed to prove an issue of foreign law, the consequences could include defaulting to the law of the forum, application of generic "principles of law," or dismissal of the action altogether. Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 692-94 (1967).

2. This Court recognized courts' independent duty to reach accurate determinations of foreign law long before Rule 44.1. Chief Justice Marshall's opinion for the Court in *Church v. Hubbart* explained that foreign law inquiries should be guided by "[t]he principle that the best testimony shall be required which the nature of the thing admits of." 6 U.S. (2 Cranch) 187, 236-37 (1804). A century later, in a case concerning the "foreign law" of a state, this Court found that courts have an independent duty to construe and interpret state law even where those laws have been "proved" via testimony or documents. *Eastern Bldg. & Loan Ass'n v. Williamson*, 189 U.S. 122, 126-27 (1903) (citation omitted) ("While statutes and decisions of other States are facts to be proved . . . their construction and meaning are for the consideration and

judgment of the courts in which they have been proved," and "[n]o witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence."). Applying this concept to the law of foreign nations, Justice Story observed that "the object of the proof of foreign laws is to enable the Court to instruct the jury what, in point of law, is the result from foreign law to be applied. . . ." Joseph Story, Conflict of Laws § 638, at 895 (2d ed. 1841). Reviewing courts "are therefore to decide what is the proper evidence of the laws of a foreign country . . . [and] to judge of their applicability, when proved, to the case at hand." *Id.*

In *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854), this Court confronted claims to land grants founded on the law of former Mexican territories. The Court noted that although the territorial laws in question "were never treated by the court as foreign laws, to be decided as a question of fact," it was nevertheless

> undoubtedly often necessary to inquire into [foreign] official customs and forms and usages. . . . And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that *it is for the court to decide what weight is to be given to information obtained from any of these sources.* It exercises the same discretion and power, in this respect, which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion

> as to the unwritten law of the State, or the construction given to one of its statutes.

Id. at 557 (emphasis added).

After *Fremont*, and until the enactment of Rule 44.1, lower courts generally understood that judges had an independent duty to "find the meaning of the foreign law as [they] would if the meaning to be ascertained were that of a deed or an agreement." *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of New York*, 170 N.E. 479, 483-84 (N.Y. 1930) (Cardozo, C.J.). That said, many lower courts struggled to apply consistent or efficient procedural standards in determinations of foreign law. Miller, 65 Mich. L. Rev. at 616-17. Rule 44.1 was designed to eliminate the antiquated procedural fiction that labeled foreign legal questions as factual issues, and to replace formalistic evidentiary rules with "maximum flexibility about the material to be considered and the methodology to be employed." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2444, at 349 (3d ed. 2008).

3. The desire to enhance the accuracy of the federal courts' interpretations of foreign law animated the decision to shift from a fact- to a law-based approach. *See* Miller, 65 Mich. L. Rev. 613. Arriving at a correct interpretation of foreign law may be straightforward in some cases given the wealth of primary and secondary materials regarding the forum country's laws, *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633-34 (7th Cir. 2010) (Posner, J., concurring), whereas in other cases the court may need to engage in a more detailed examination of the "day-to-day realities of the practice of law" in a given country, including "the way

in which one branch of the other country's law interacts with another," *id. at* 638-39 (Wood, J., concurring). In all cases, the object of a Rule 44.1 inquiry is to arrive at an accurate interpretation of foreign law.

Rule 44.1 protects courts' discretion to reach accurate interpretations by allowing the consideration of "any relevant material, including testimony, without regard to its admissibility," and authorizing courts to "engage in [their] own research and consider any relevant material thus found." Fed. R. Civ. P. 44.1 Advisory Committee's Notes (1966) (Adoption); *see also* 9A Wright & Miller, *Federal Practice and Procedure* § 2444 (3d ed. 2008) (Rule 44.1 "dissipates former inhibitions on judicial inquiry" and allows judges to "accept these materials and give them whatever probative value he or she thinks they deserve"). Courts have considered judicial precedents, statutes, regulations, enforcement actions, statements of public officials, treatises and law review articles, expert testimony, and articles in the popular press. *See, e.g., United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir. 1993) (collecting cases). In reviewing any of these materials, the trial court has broad discretion to accept or disregard arguments based on their relative merit and persuasive value. 9A Wright & Miller, *Federal Practice and Procedure* § 2444.

B. Binding Deference is Incompatible with Rule 44.1 and Judicial Discretion to Reach an Independent and Accurate Determination of Foreign Law.

The Second Circuit's deference standard is incompatible with the text and purpose of Rule 44.1.

Federal courts are not obliged to subordinate their authority to interpret foreign law to an arm of a foreign government simply because that government chooses to appear as *amicus curiae* in pending litigation. To hold, as the Second Circuit did, that the District Court lacked discretion to "challenge [the Ministry's] official representation to the court regarding its laws or regulations" plainly misapprehends the responsibility of the federal courts under Rule 44.1 and undermines the longstanding interests in independence and accuracy that the Rule was designed to protect. Pet. App. 26a.

As nearly all courts had held prior to the decision below, a foreign sovereign's statement interpreting its own law is entitled to respect, but such a statement need not (and should not) be given "binding" or "conclusive" effect as a matter of law. *See United States v. McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003) (courts may, but are not required to, defer); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (same); *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (same). Courts have almost uniformly declined to apply conclusive or "binding" deference for several reasons.

1. The text of Rule 44.1 authorizes trial courts to "consider any relevant material or source" in reaching a determination of foreign law. Binding deference, by contrast, would sometimes require courts to disregard materials that contradict a foreign sovereign's statement, rendering any consideration of such materials meaningless. A binding deference standard would therefore re-impose the "inhibitions on judicial inquiry" that Rule 44.1 sought to dismantle, and interfere with a judge's prerogative to give foreign legal

materials "whatever probative value he or she thinks they deserve." 9A Wright & Miller, *Federal Practice and Procedure* § 2444.

The discretion Rule 44.1 commits to the federal courts cannot be overridden by a categorical rule imposed via judicial fiat. The Federal Rules are promulgated pursuant to an express congressional delegation of authority, which provides that any "laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). As this Court has held in other contexts, where Congress has enacted a discretionary regime, courts should not replace that discretion with judge-made categorical rules. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-94 (2006). That principle applies with equal force to the decision below, which imposed its categorical deference rule based upon principles of comity that are plainly not "a matter of absolute obligation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

2. A rule that requires binding deference to foreign sovereign statements regardless of persuasiveness or accuracy is in tension with the mandate in Rule 44.1 that courts engage in a legal (rather than factual) inquiry. Factual inquiries are limited— the factfinder (be it a jury or judge) cannot introduce new facts into the record, and is therefore dependent upon the parties to identify the relevant witnesses and documents to establish the truth or falsity of relevant allegations. By contrast, legal inquiries, including the one required by Rule 44.1, require the reviewing court to construe law accurately—subject to *de novo* review on appeal—but grant courts considerable discretion to consider and give weight to whatever sources of law best address the

question presented. Thus, courts applying Rule 44.1 should not be constrained by whether a legal interpretation is offered by a plaintiff, defendant, expert witness, or foreign government *amicus* brief—the rule grants courts the discretion to perform research *sua sponte* and "to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." Fed. R. Civ. P. 44.1 advisory committee's notes (1966) (Adoption).[10] Because the Second Circuit's standard turns on the *identity* of the party offering the foreign legal interpretation, rather than the *content* of the offered interpretation, it upends the purpose of Rule 44.1. *amicus*

The Second Circuit compounded its error by holding that the *mere appearance* of a foreign sovereign before the court mandates greater deference than is owed to statements of sovereigns that do not appear.[11] That rule is incoherent: a legal statement offered by a

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[10] To be sure, there are circumstances in which certain deference regimes operate to cabin legal inquiries, but those circumstances are the exception rather than the rule, and courts have eschewed conclusive or binding deference standards except where they are necessary to satisfy constitutional separation of powers principles. *See infra*, at 47-55.

[11] Pet. App. 30a n.10 (the District Court's holding would have been "entirely appropriate" had the Chinese Government "not appeared in this litigation"); Pet. App. 23a (distinguishing an earlier case because the "Chilean Government did not appear before the court in that case," so the "deference [that] court afforded the Chilean affidavit does not guide our application here"); Pet. App. 25a (courts are "bound to defer" where a foreign government "directly participates in U.S. court proceedings").

foreign government prior to, or outside the context of, ongoing litigation is far *less* likely to be biased, and *more* likely to be accurate, than a statement offered by a sovereign that is seeking to influence ongoing litigation. *Cf.* Pet. App. 236a-237a (disclosing the Ministry's joint defense agreement and "very strong interest aligned with the defendants in the case"); Pet. App. 120a (noting that the Ministry's 2009 statement "reads like a carefully crafted and phrased litigation position"). Yet courts following the panel's rule would be more inclined to defer to a slanted legal interpretation contained in a litigation statement than one appearing in an independent statement made prior to litigation. If affirmed, this deference-on-appearance rule will incent the submission of foreign-sovereign *amicus* briefs asserting novel or unsupported legal positions whenever U.S. litigation threatens favored foreign companies with liability.

A separate but related incoherence in the Second Circuit's standard was its repeated reference to the importance of the "sworn evidentiary proffer" provided by the Ministry. Pet. App. 25a. The only "proffer" in this case was a declaration from the Ministry's outside counsel at a U.S. law firm, the "sworn" component of which amounted to representations relating to the authenticity of documents. *See* Declaration of Joel M. Mitnick in Support of the Brief of *Amicus Curiae* the Ministry of Commerce of People's Republic of China, *In re Vitamin C. Antitrust Litig.*, 06-md-1738, (E.D.N.Y. Sept. 22, 2006), ECF No. 70; *compare, e.g., Mitchell*, 985 F.2d at 1280 (considering, but not deferring to, the sworn affidavit of a Pakistani official offering an interpretation of Pakistani law). It is impossible to discern why the submission of a declaration from an

attorney at a foreign government's U.S. law firm should be relevant, let alone dispositive, to the level of deference provided to that government's legal interpretation.

3. Granting "binding" deference to foreign sovereign legal statements risks undermining the enforcement of U.S. laws. Most obviously, the standard would undermine both government and private enforcement of the antitrust laws against foreign cartels selling products in the United States. The panel's approach would immunize plain violations of U.S. antitrust laws anytime a foreign government appears in U.S. court and asserts that their laws compelled the anticompetitive conduct. Such a regime would permit opportunistic foreign governments to misconstrue their laws to shield their citizens and businesses from U.S. litigation. Liability for foreign anticompetitive conduct can turn on whether the foreign government merely encouraged or allowed the conduct, in which case there is liability, or actually compelled the conduct, in which case there is not. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706–07 (1962). Under the panel's approach, foreign governments could dictate dismissal of an otherwise valid claim by asserting for the first time in an *amicus* brief that foreign laws compel anticompetitive conduct even where those laws, on their face, do nothing more than *permit* it. *Cf. Hartford Fire*, 509 U.S. at 798-99.

When, as here, some or all of a cartel's members are directly or indirectly state-owned,[12] or partly owned by government officials, foreign companies are likely to find willing sovereign partners to provide legal cover. Pet. App. 88a n.19 (employee of conspiring company noting, with respect to this litigation, that "[e]ven if [defendants] lost the case, the government would take the foremost part of the responsibility"). As the District Court found, the cartel of Chinese exporters in this case, having persuaded the Ministry to take a self-interested position at odds with the text of the relevant regulatory authorities and China's prior public statements, represents this fear fully realized. Pet. App. 122a ("Although the Ministry encouraged defendants' cartel and now fervently desires that defendants be dismissed from this suit, those policy preferences do not establish that Chinese law 'required' defendants to follow their anti-competitive predilections.").

The risks of a "binding deference" standard extend beyond the antitrust context. Foreign sovereigns are often sued under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, and questions of foreign law frequently arise under that act. U.S. courts also decide foreign law questions in a wide variety of other contexts such as the recognition of foreign judgments, *e.g.*, *de Fontbrune v. Wofsy*, 838 F.3d 992 (9th Cir. 2016) (applying French law to decide whether a foreign judgment was compensatory, and therefore

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[12] *See* Br. in Opposition at iii (June 5, 2017) (corporate disclosure statement).

enforceable, under California law), and private transnational disputes in which foreign governments have a strong interest, *e.g. Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass 1993) (denying defendants' motion to dismiss suit by Turkey to recover ancient coins over which Turkey claimed ownership under Turkish law). All of these areas would be vulnerable to mischief under the decision below.

4. A "binding deference" standard also would invite manipulation of the federal courts. Foreign sovereigns may sue as plaintiffs in federal courts, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964), and questions of foreign law (and deference to foreign governments' interpretations of that law) frequently arise in such suits, *e.g. McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012); Pet. 24. The Second Circuit's standard could invite foreign governments to sue in U.S. court knowing that the U.S. standard of binding deference to its legal position would allow them to engineer a result in our courts that could not be assured in their own. Further, foreign companies could bring claims involving novel or unsupported applications of foreign law, but prevail in U.S. court simply by convincing a friendly government agency to file an *amicus* brief supporting the interpretation.

This case demonstrates the accuracy costs that would be imposed by a binding deference standard. By accepting, without scrutiny, the Ministry's statement as binding, the panel embraced a statement that the District Court had found to be ambiguous, inconsistent with and contradicted by the record, and less than fully honest. *Supra* at 16-19. The Second Circuit's binding deference standard undermines the central task

afforded to courts by Rule 44.1: to determine and apply the *correct* foreign law.

II. There Is No Legal Basis for Requiring the Application of Binding Deference.

Neither of the two bases on which the Second Circuit relied—this Court's decision in *United States v. Pink* and the doctrine of international comity—supports a standard of binding deference to foreign governments' legal statements.

A. This Court's Precedents Do Not Support the Application of a "Conclusive" Deference Standard Under Rule 44.1.

The Second Circuit misread this Court's decision in *United States v. Pink*, 315 U.S. 203 (1942), to require the application of "conclusive" deference to "an official statement or declaration from a foreign government clarifying its laws." Pet. App. 20a, 25a. *Pink* announced no such rule, and even if it had, the rule would not control the outcome of this case.

1. *Pink* arose out of the nascent Soviet government's 1918 nationalization of Russian insurance companies. At that time, the New York superintendent of insurance took possession of the assets of First Russian Insurance Company, which had operated in New York before nationalization, and still held the funds as of 1933, when the United States recognized the USSR and executed the "Litvinov Assignment," in which the USSR assigned claims for "amounts . . . that may be found to be due it, as the successor of prior Governments of Russia . . . from American nationals, including corporations" to the U.S. government. *Id.* at 212. Accordingly, in 1934 the United States brought suit to recover First Russian's assets from New York's

then-Superintendent, Louis Pink, claiming an entitlement under the Litvinov Assignment to the funds. *Id.* at 211.

Among other defenses, Pink claimed that the 1918 nationalization decree "had no extraterritorial effect, according to Russian law." *Id.* at 214. While the litigation was pending, the U.S. government requested that the Russian "Commissariat for Foreign Affairs" obtain and transmit through "diplomatic channels" an "official declaration by the Commissariat for Justice" clarifying the decree's intended extraterritorial effect. *Id.* at 218-19.

The Commissariat for Justice responded to the Executive Branch's request by producing an official declaration that the decree did have extraterritorial effect under Russian law. *Id.* at 219-220. And, crucially, this Court noted that "the referee in" an earlier case, *Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 20 N.E.2d 758 (N.Y. 1939), had found, "*and the evidence supported his finding*, that the Commissariat for Justice ha[d] power to interpret existing Russian law." *Id.* at 220 (emphasis added). "*That being true*," this Court found the Commissariat's official declaration "conclusive so far as the intended extraterritorial effect of the Russian decree." *Id.* at 221 (emphasis added).

2. This Court in *Pink* determined that it did not need to review "all the evidence in the voluminous record of the Moscow case." *Id.* at 218. This was not because the Court was obliged to defer to the Commissariat as a matter of law, but because the "expert testimony tendered by the United States gave great credence to its position" about the effect of the

nationalization decree and Commissariat's power to interpret it. *Id.* At no point did this Court hold that a foreign government's declaration of foreign law is always conclusive; nor did this Court announce a rule that such declarations should presumptively be treated as such. Because *Pink* offered no prospective rule of deference, its acceptance of the Commissariat's interpretation of Russian law cannot be separated from the case's context, including: (1) the Court's finding that the Commissariat had power to interpret Russian law; (2) the recognition that the Commissariat had submitted its interpretation in response to an explicit invitation from the U.S. Executive Branch; and (3) a wealth of record evidence that confirmed that interpretation. *See id.* at 241 (Frankfurter, J., concurring) ("The controlling history of the Soviet regime and of this country's relations with it must be read between the lines of the Roosevelt-Litvinov Agreement. One needs to be no expert in Russian law to know that the expropriation decrees intended to sweep the assets of Russian companies taken over by that government into Russia's control no matter where those assets were credited.").

Further, the substantive dispute in *Pink* involved weighty separation-of-powers concerns, including the President's power as the "sole organ" of foreign affairs to recognize the validity of foreign governments. *See Pink*, 315 U.S. at 229, (explaining that the Executive's active participation in the litigation, on the heels of granting diplomatic recognition to the USSR and negotiating a comprehensive treaty with its government, implicated the President's Recognition power and his status as the "sole organ" of foreign affairs) (citing *United States v. Curtiss-Wright Export*

Corp., 299 U.S. 304, 320 (1936)). This case, by contrast, does not implicate the Executive's recognition power or a foreign legal statement solicited and endorsed by the U.S. government in the course of its diplomatic activities. Instead, the United States has urged this Court to hold that the Ministry's legal statement should not be granted conclusive deference, just as the United States does not receive conclusive deference for its legal statements offered in foreign courts. Br. for the United States as *Amicus Curiae* at 11-12 (certiorari stage) (Nov. 14, 2017) ("U.S. Invitation Br.").

3. To the extent *Pink* could be read to stand for a general proposition regarding the standard of deference owed to foreign sovereigns, that standard could not apply absent a threshold showing that the specific arm of foreign government "has power to interpret" the foreign law at issue. Yet even that reading of *Pink* would produce an unworkable standard given that the antecedent inquiry of *who* has the power to issue an authoritative interpretation of foreign law is itself a question of foreign law. A doctrine of conclusive deference to authoritative foreign legal statements would thus send courts into an interpretive hall of mirrors that this Court's decision in *Pink* did not contemplate, let alone intend.

Here, unlike *Pink*, there was no evidence, and certainly not "well supported" evidence, that the Ministry has the power to interpret Chinese law. From the time this litigation was filed until it was appealed to the Second Circuit, the Ministry made no such claim—instead, the Ministry claimed only that it is the highest Chinese authority empowered to regulate foreign trade, Pet. App. 6a, 168a, 190a. When the Ministry eventually claimed for the first time on

appeal to possess law-*interpreting* power, the Ministry cited no authority in support of its claim. Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China at 14, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105. Thus, even under the panel's expansive interpretation of *Pink*, the Ministry would not be entitled to binding deference.

B. International Comity Does Not Support a Standard of Binding Deference to a Foreign Government's Legal Statements.

International comity, which is the basis for deference to foreign law in the United States, William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2072 (2015), neither requires nor supports a standard of binding deference to foreign sovereign legal statements.

1. Despite its name, international comity doctrines are a matter of domestic law, and "are generally not required by international law." *Id.* at 2074 & nn.22-24. Thus, even at the apex of comity-based deference to foreign law, such deference remains a "voluntary act of the nation by which it is offered." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839). A U.S. court may, for example, decline to apply foreign law that choice-of-law principles would otherwise mandate if the foreign law contravenes a strong public policy of the forum. *Id.* ("The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests."); Joseph Story, Commentaries on the Conflict of Laws § 25, at 31 (2d ed. 1841).

2. International comity is satisfied by a standard of deference that prioritizes accuracy, reliability, and judicial independence. *See* 3 Imre Zajtay, *The Application of Foreign Law*, International Encyclopedia of Comparative Law, Private International Law 14-24 (Kurt Lipstein ed., 2011) ("When the rules of the conflict of laws of the *lex fori* require the application of foreign law, they clearly require that it should be applied correctly . . . ."). Comity among the several States, as expressed through U.S. conflict-of-laws principles, requires only that the States endeavor to apply one another's laws accurately. *E.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953) ("The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."). And this Court has recognized that the States, as "members of the same great political family" owe one another a "greater degree of comity" than international comity requires among foreign nations. *Bank of Augusta*, 38 U.S. (13 Pet.) at 590; *cf. Nevada v. Hall*, 440 U.S. 410, 424-26 (1979). International comity should not require more. *See* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11 (2010) ("[I]nternational comity encourages U.S. courts to apply foreign law in appropriate cases . . . .").

Although international comity incorporates principles of "reciprocal tolerance and goodwill," *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. Of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part), there is no reciprocity interest in adopting a

binding deference standard. To the contrary, such a standard would be an international outlier. As the Solicitor General has explained, the U.S. "is not aware of any foreign-court decision holding that the Department's representations" about the meaning of U.S. law are entitled to "conclusive" deference, U.S. Invitation Br. at 11-12, and the Justice Department expects a standard of deference in step with the accuracy principle underlying conflict-of-laws doctrine. *Id.*; *supra*, at 44.

3. None of the dominant international agreements support a binding deference standard. Large majorities of European nations and of North, Central, and South American nations have formalized their respective practices in two major treaties, each of which establishes a system for requesting opinions on foreign legal questions from the appropriate government while explicitly providing that those opinions do not bind the receiving country.[13] Notably, both treaties also require their signatories to establish a single, centralized authority to receive and act on requests from other nations' tribunals, to ensure that each country speaks

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[13] The European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154 ("European Convention"); Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111 ("Inter-American Convention") (countries receiving statements about the meaning of another country's law "shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received"); *see also* Explanatory Report to the European Convention on Information on Foreign Law ¶ 34, E.T.S. No. 062.

with one voice on questions of its domestic law.[14] Although the United States is not party to either treaty, it has recommended to the Hague Conference on Private International Law that any new instrument for cross-border co-operation concerning the treatment of foreign law should provide responses that are

> non-binding in the context of the specific proceeding for which the foreign law was sought (in other words, the information provided would constitute prima facie evidence subject to potential rebuttal). The usefulness of any opinion on foreign law could depend on the persuasiveness of the reasoning in the opinion and the sources on which the opinion relies.

Response of the United States of America to Feasibility Study on the Treatment of Foreign Law Questionnaire, Preliminary Doc. No. 25 of Oct. 2007 for the attention of the Council of Apr. 2008 on Gen. Affairs and Pol'y of the Hague Conference on Private Int'l Law.[15]

Independent of treaty obligations, Petitioners are aware of no foreign courts that consider themselves

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[14] European Convention art. 2 (each party must "set up or appoint a single body . . . to receive . . . [and] take action on" requests for information on the party's domestic law"); Inter-American Convention arts. 6, 9 ("[E]ach State Party shall designate a Central Authority" and "shall reply to . . . requests from the other States Parties through its Central Authority."); *cf.* European Convention art. 2 (a party "*may* set up . . . one *or more* bodies" to "transmit" requests from its courts to a foreign country's designated central authority) (emphasis added).

[15] https://assets.hcch.net/upload/wop/genaff_pd09us.pdf.

legally "bound to defer" to another country's submission asserting a particular interpretation of its own law. On the contrary, foreign courts generally retain their independent authority to decide foreign legal questions for themselves. *See generally* Yuko Nishitani, *Treatment of Foreign Law – Dynamics Towards Convergence?* (2017) (compiling national reports on the treatment of foreign law in more than thirty countries).

Collectively, by emphasizing judicial independence and their privileging of a central interpretive authority, these longstanding international practices show the Second Circuit's binding deference standard to be an outlier.

III. Analogous Deference Doctrines Counsel Against Application of "Binding" Deference to Foreign Sovereign Legal Statements.

The Second Circuit's rigid rule of binding deference cannot be squared with the more flexible deference standards that courts have applied to legal interpretations offered by federal and state agencies, and even state courts. Unlike foreign sovereigns, the Executive Branch and organs of state governments are entitled to respect not just as a matter of comity—instead, the deference they are owed derives from the Constitution's allocation of powers between and among federal and state governments. However important "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states" may be, *Société Nationale*, 482 U.S. at 543 n.27, that spirit cannot justify privileging the representations of foreign

governments over the official representations of U.S. federal and state governments.

A. Principles of *Chevron* Deference Do Not Support a Rule of Binding Deference.

Some courts have attempted to analogize to deference principles deriving from *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), in articulating the standard of deference due to foreign government legal interpretations. *E.g.*, *Access Telecom*, 197 F.3d at 714; *In re Oil Spill*, 954 F.2d 1279, 1312 (7th Cir. 1992). But the *Chevron* doctrine cannot be sensibly applied to foreign government statements offered under Rule 44.1 and, in any event, firmly-established *Chevron* principles would preclude the application of "binding" deference to the Ministry's statement in this case.

1. *Chevron* requires courts to defer to an administrative agency's reasonable interpretation of an ambiguous statute that Congress has charged the agency with administering. 467 U.S. at 843-44 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). The rule gives effect to Congress's decision to allocate interpretive authority to federal agencies. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Deference is not required because agencies have superior expertise in statutory interpretation, but because courts respect Congress's constitutional authority to decide that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administrative agency." *City of Arlington, Tex. v. FCC*,

569 U.S. 290, 296 (2013). As such, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *Id.* at 306 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

The deference that the Judicial Branch owes to its coordinate branches of government under the Constitution is different, in both degree and kind, than the respect that U.S. courts must show to foreign sovereigns. The judiciary's obligation to refrain from usurping Congress's law-making role is a constitutional command that derives from the powers allocated under Articles I and III, as well as the Supremacy Clause of Article VI. By contrast, the respect owed to foreign sovereigns derives from discretionary principles of international comity. *See Hilton*, 159 U.S. at 163-64. In the context of a foreign sovereign's legal statement, Congress has made no delegation to the sovereign that could plausibly require an Article III court to refrain from exercising its duty to answer a question of law. *Chevron* thus fails to provide a useful guide for evaluating foreign sovereign legal statements.

2. Even on its own terms, *Chevron* counsels against a rule of "binding" deference to foreign legal submissions. *Chevron* has several distinct steps, all of which the Second Circuit's standard would discard in favor of a standard that is far more deferential than the respect that is owed to U.S. agencies.

a. Deference cannot even be considered under *Chevron* unless it is first established that "Congress delegated authority to the agency generally to make

rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226. If that requirement has been satisfied, a reviewing court must then engage in a statutory interpretation exercise to determine whether the relevant statute is "silent or ambiguous with respect to the specific issue," and if so, whether the agency's interpretation is a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. The reviewing court—which remains the "final authority on issues of statutory construction"—must first employ "traditional tools of statutory construction" to determine whether the statute is ambiguous on the "precise question at issue," and that Congress has thereby implicitly delegated interpretive authority to the agency. *Id.* at 843 n.9. This step of the *Chevron* inquiry is often outcome-determinative. *See, e.g., Kingdom Tech., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016).

Chevron's threshold inquiries do not fit within the Second Circuit's standard. Though the Court of Appeals allowed that a foreign government's evidentiary "proffer" must be "reasonable under the circumstances presented," Pet. App. 25a, it held that if "deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations." *Id.* at 25a-26a. The inability to "challenge" a foreign government's construction of a foreign statute is incompatible with a court's duty under *Chevron*, and would leave courts

with far less discretion than they possess when reviewing the legal interpretations of the U.S. Executive Branch.[16]

The Second Circuit compounded its error by holding that the mere fact of a foreign sovereign's appearance (as *amicus*) automatically triggers a stronger form of deference. Pet. App. 30a n.10. That holding cannot be squared with the principle that deference is appropriate only when "the agency interpretation claiming deference was promulgated in the exercise of . . . authority," granted by Congress, "to make rules carrying the force of law." *Mead*, 533 U.S. at 226-27. Under *Mead*, the fact that an agency shows up in court does not mean its interpretation is worthy of deference—the relevant question is whether the agency's submission relies upon legally-binding rules that the agency was authorized to issue. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that interpretations promulgated in "opinion letters . . . policy statements, agency manuals, and enforcement guidelines" are instead "entitled to respect . . . , but only to the extent that those interpretations have the 'power to persuade.'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The question

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[16] For example, this Court has explained that "the meaning attributed to treaty provisions by [executive] agencies charged with their negotiation and enforcement is entitled to great weight," but is "not conclusive." *Sumimoto Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). The Second Circuit's rule would accordingly grant foreign agencies more deference than the U.S. Department of State receives on the same question of treaty-interpretation.

whether an agency has appeared (as a party or an *amicus*) is irrelevant to whether the agency's proposed legal interpretation carries the "force of law."[17]

b. Beyond *Chevron*'s threshold inquiries, there are many scenarios under which the Second Circuit's standard would require deference when *Chevron*'s framework would refuse it. For example, *Chevron* permits courts to consider "the consistency of an agency's position [as] a factor in assessing the weight that position is due," *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993), and "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza-Fonseca*, 480 U.S. 421,

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[17] Even under a framework relying upon *Auer* deference, *see Auer v. Robbins*, 519 U.S. 452 (1997), the Second Circuit's "binding deference" standard is inappropriate. *Auer* deference is "undoubtedly inappropriate, for example, when [1] the agency's interpretation is plainly erroneous or [2] inconsistent with the regulation" being interpreted, "[3] when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," as when "[4] the agency's interpretation conflicts with a prior interpretation, or [5] when it appears that the interpretation is nothing more than a convenient litigating position, or [6] a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citations and internal quotation marks omitted). The "binding deference" standard would forbid the kind of inquiry that any court must perform under *Auer*, and the inquiry that this Court described in *Christopher* is precisely the kind of inquiry in which the District Court engaged. *Supra*, at 16-19.

446 n.30 (1987). Though an agency may shift positions, it must "cogently explain why it has exercised its discretion in a given manner," as with any other agency decision, and "the basis articulated by the agency itself," not "appellate counsel's *post hoc* rationalizations," must satisfy the court, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 50 (1983). By contrast, the Second Circuit's standard would foreclose the examination of a sovereign's prior statements when those statements appear outside the four corners of the sovereign's brief. *See* Pet. App. 28a-30a & n.9 (holding that the District Court abused its discretion by examining and weighing evidence of prior Ministry statements and policies evincing voluntariness, as well as contradictory statements such as China's statement to the WTO that it "gave up export administration of . . . vitamin C" as of January 1, 2002, Pet. App. 74a).

Further, this Court's *Chevron* cases have held that "[d]eference to what appears to be nothing more than an agency's convenient litigating position" would be "entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). As the *Bowen* Court explained:

> We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. . . . 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'

Id. at 212 (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Yet the Second Circuit held that

the District Court abused its discretion in holding that the Ministry's interpretation of Chinese law amounted to a "carefully crafted and phrased litigating position." Pet. App. 120a.

3. To the extent that this Court's *Chevron* cases inform the question presented, the relevance is limited to cases where this Court has considered how to weigh materials to which there is no legal obligation to defer. In such circumstances, this Court has recognized the value in "[t]he well-reasoned views of the agencies implementing a statute," which "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Mead*, 533 U.S. 227 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

This Court has highlighted certain guideposts for reviewing courts: absent an obligation to defer, the weight given to an agency construction of law "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Even before *Skidmore*, courts adopted similar reasoning in the context of determining foreign law. *E.g.*, *Petrogradsky Mejdunarodny Kommerchesky Bank*, 170 N.E. at 483-84 (Cardozo, C.J.).

Petitioners agree with the United States that among the factors articulated above, other factors that give a foreign government's statement the "power to persuade" include the statement's "clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency

with past statements; and any other corroborating or contradictory evidence." Br. of the United States as *Amicus Curiae*, at 8.[18] That is precisely the inquiry in which the District Court engaged in this case. Pet. App. 119a-122a.

B. The Level of Deference Granted to State Entities Counsels Against Binding Deference to Foreign Governments.

A standard of "binding deference" also finds no support in the tradition of federal-court deference to arms of state governments, and would result in foreign governmental entities receiving *more* deferential treatment than a sovereign state. The Constitution requires the opposite balance. *Bank of Augusta*, 38 U.S. (13 Pet.) at 590; *see Bond v. Hume*, 243 U.S. 15, 22 (1917) ("It is certain" that the principles of comity "which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other . . . and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected.").

Federal courts owe states and state instrumentalities significant respect, as "courts of a common country," *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916), whose mutual relationships with the federal government are governed by the Constitution and federal law. *See*

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[18] The United States has endorsed this sensible approach for at least the past fifteen years. *See* Br. for the United States in Opposition at 17-18, *McNab v. United States*, Nos. 03-622 & 03-627 (Dec. 29, 2003).

Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). Despite the respect that sovereign states are owed, including the principle that states are the final arbiters of their own law, this Court has long held that only the highest court in a given state is entitled to conclusive deference to the interpretation of that state's own laws—by contrast, the decisions of lower and intermediate state courts receive only "some weight" and are not "controlling" in federal court. *See Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 160-61 (1948). By analogy to that practice, courts have long held that the decisions of foreign intermediate courts should not be taken as authoritative statements of foreign law in U.S. court. *Yone Suzuki v. Cent. Argentine Ry.*, 27 F.2d 795, 800 (2d Cir. 1928) (holding that the court was not bound by an Argentinian intermediate appellate court's interpretation of Argentinian maritime law).

Similarly, federal courts have long held that state administrative agencies are entitled to "substantial deference" when interpreting their own regulations, but not "binding deference" that would preclude any challenge to a state's proffered interpretation. *E.g. City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008) (noting that federal courts "generally defer to a state agency's interpretation of those statutes it is charged with enforcing"); *Pharm. Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1207-08 (11th Cir. 2002) (granting "substantial deference" to a state agency's interpretation of state law). Even under such a standard, agency interpretations that fail to offer a "reasoned and consistent view" of the agency's regulations are not

entitled to deference, and "no deference" need be granted "to an interpretation put forth merely as a litigation position." *Idaho Dep't of Health & Welfare v. U.S. Dep't of Energy*, 959 F.2d 149, 152-53 (9th Cir. 1992).

When a state's attorney general files an *amicus* brief asserting a particular interpretation of state law, this Court has maintained that a federal court need not defer to that interpretation. *See Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (the Court of Appeals appropriately concluded that "it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute" despite the Florida Attorney General's participation as *amicus* asserting an interpretation, *see id.* at 216 (Black, J., dissenting)); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959) (the District Court did not abuse its "fair and well-considered judicial discretion" when, "[c]aught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana," it declined to adopt the Attorney General's view). There is no justification for granting greater deference to the representative of a foreign trade ministry than is owed to the highest law enforcement officials of a state, yet that is precisely the result of the decision below.

IV. The Second Circuit's Judgment Should Be Reversed.

At every stage of this litigation, the District Court evaluated the Ministry's legal claims in light of the developing record, and determined that Chinese law did not compel all of Respondents' anticompetitive conduct. Pet. App. 118a-155a, 168a-186a. That

determination was correct. This Court should reverse the panel's subsequent resuscitation of Respondents' comity defense.[19]

Based solely on the standard of "binding deference" that it imposed, the Court of Appeals reversed the District Court's otherwise "entirely appropriate" analysis of Chinese law that governed the case to final judgment. Pet. App. 30a n.10. Then, finding for the first time in the litigation that a "true conflict" between Chinese and U.S. law had existed, the panel devoted five paragraphs to applying a ten-factor "comity balancing test," after which it vacated the District Court's judgment and the jury's verdict, and reversed the District Court's order denying Respondents' motion to dismiss. Pet. App. 33a-38a. As the Second Circuit

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[19] The breadth of the Court of Appeals' error is evident in its indefensible decision to order the dismissal of Petitioners' complaint, with prejudice, without any explanation of how the comity doctrine barred adjudication of Petitioners' distinct claims for liability under the Sherman Act. Petitioners' advanced two claims, each of which was undisputed: that Respondents (1) unlawfully fixed export prices, including above the verification and chop price of $3.35; and (2) unlawfully colluded on output and export volume. Pet. App. 56a. To warrant dismissal, Respondents were required to show that Chinese law compelled them to engage in *both* categories of unlawful conduct. Pet. App. 126a (explaining that "even if Chinese law did involve some compulsion, summary judgment would still be denied because Chinese law assuredly did not compel all of defendant's illegal conduct"). The panel did not explain how Chinese law compelled output restrictions, or Respondents' numerous agreements to fix prices at specific levels *above* the supposed minimum price of $3.35. This same error infected the panel's finding regarding Petitioners' request for injunctive relief. Pet. App. 36a-37a.

acknowledged, that disposition was compelled entirely by its conclusion that the District Court had applied the incorrect standard of deference, which was dispositive of the panel's analysis of Chinese law and its "true conflict" analysis in general. Pet. App. 30a n.10, 27a.

Stripped of its erroneous holding that the Ministry's appearance mandated conclusive deference, all that remains of the panel's conclusion is its concession that the District Court's analysis of Chinese law was "entirely appropriate." Pet. App. 30a n.10. Accordingly, should this Court agree that the Second Circuit should not have applied "binding deference," there could be no plausible basis for comity-based abstention from jurisdiction over petitioners' antitrust claims. *See Hartford Fire*, 509 U.S. at 798 (comity-based abstention, if ever appropriate, is inappropriate absent a "true conflict" between foreign and U.S. law); *In re Icenhower*, 757 F.3d 1044, 1051-52 (9th Cir. 2014) (same); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006) (same); *see also Société Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part) ("whether there is in fact a true conflict between domestic and foreign law" is "the threshold question in a comity analysis"); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation*, § 4.2.2 at 32 (2017). This Court should reverse the Second Circuit's judgment as to Respondents' comity defense, and remand for further proceedings as to Respondents' remaining defenses.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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FEBRUARY 26, 2018

No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 28, 2018

QUESTION PRESENTED

Whether the court of appeals correctly deferred to a formal interpretation of Chinese trade law, as presented to the federal courts by the Ministry of Commerce of the People's Republic of China on behalf of that country's government, where the Ministry's statement was "reasonable under the circumstances presented," the district court's contrary interpretation was "nonsensical" and paid no regard to China's regulatory goals, and the district court's reasons for rejecting the Ministry's interpretation were ill-founded.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

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STATEMENT OF THE CASE

A. Introduction

Chinese law compelled price-fixing of Vitamin C throughout the relevant period. That was not only the conclusion of the court of appeals below. In a closely related matter, the World Trade Organization ("WTO"), agreeing with the United States, Europe, and Mexico, confirmed that "China require[d] exporting enterprises to export at set or coordinated export prices or otherwise face penalties." Chinese law thus conflicted directly with the Sherman Act.

In this litigation, for the first time in history, China appeared before an American court as an *amicus curiae*. It did so to describe what was required of Vitamin C manufacturers under its regulatory system. China explained logically how its regime commanded companies to reach coordinated export prices as a group, without the need for the government to dictate specific prices. But instead of the respect this Court has required of the formal submissions of foreign governments, the district court effectively accused China of misrepresenting its system to protect its nationals, based largely on its plainly erroneous view that China's representations to the WTO were inconsistent with its submissions in this case. Rejecting China's statements, the district court interpreted the governing regulations in a way that rendered the provisions incoherent and unworkable.

The court of appeals, properly exercising *de novo* review, analyzed China's submissions and the applicable regulations. It determined that China's analysis was reasonable and reliable, and established that China compelled conduct that conflicted with the Sherman Act.

Having found China's formal submissions to have been reasonable, the court held that that the district court had erred by not giving those submissions decisive weight. This "defer if reasonable" standard is not a standard of conclusive deference divorced from a careful analysis of the foreign government's submissions. It is, rather, a standard entirely consistent with the decisions of this Court. The decision below should be affirmed.

B. Statement of Facts

1. From October 1949, when Chairman Mao Zedong announced the creation of the People's Republic of China, through 1978, China had a "command economy." Under that system, the State, directed by the Communist Party, operated the significant industrial assets in the economy. JA137, 142. In 1978, however, under the leadership of Deng Xiaoping, China began a transition into a "socialist market economy," under which greater private ownership was permitted, subject to a variety of governmental controls. Pet. App. 58a-59a; JA139, 142, 171.

The transition to a "socialist" market economy was gradual, reflecting as it did a cultural change. The details of the transition were not embodied in specific statutes and regulations because Chinese law does not work that way. JA140-41; *see* Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANNUAL SURVEY OF INT'L & COMP. LAW 35, 37 (2007) (China has "downplayed the role of statutes [and] regulations" in favor of the "application of relatively few, generally drafted legal rules according to the policy needs of the political authority").

Nor is China's "socialist market economy" a market economy as understood in Western society. It

is one in which the "government is expected to monitor and control individual companies' market activities on a policy level, delegating and assigning the specifics of regulation downward." JA171. "Coordination" of the actions of companies in major industries is an important aspect of this control. "The purpose of coordination is to have domestic companies compete in the international market as a unity, to . . . advance China's collective interest." *Id.*

2. The governing agency controlling China's export trade is known today as the Ministry of Commerce (sometimes called MOFCOM). The Ministry's origins date back to 1949, when China established the Ministry of Trade. JA142. From 1993 to 2003, the Ministry was referred to as the Ministry of Foreign Trade and Economic Co-operation ("MOFTEC"). It was renamed MOFCOM in 2003 following a reorganization.

The Ministry is a component of the State Council (China's central government) and "the highest authority in China authorized to regulate foreign trade." Pet. App. 57a; JA141 & n.1. "It has the authority to draft and implement trade-related laws, regulations, policies and directives. [Its] interpretation of its own regulations and policies carries decisive weight under Chinese law." JA141-42; *see also* JA782-84.[1]

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[1] The suggestion by Petitioners (Pet. Br. 42) and *amici* Clarke and Howson (Br. 17-22) that the Ministry lacks authority to interpret Chinese law lacks any basis. China sent the U.S. State Department a diplomatic note that confirms the Ministry's authority. JA783 (referring to the Ministry's submissions as "a statement by a foreign government").

Since 1989, the Ministry has regulated the export of Vitamin C and other medicinal products through the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("the Chamber"). CAJA685. The Chamber is called a "social organization," but that English translation of a Chinese term of art can be deceptive. It exercises delegated regulatory power and acts as an arm of the Ministry. *See* CAJA747, 3715-17; Pet. App. 72a-73a, 118a-19a n.37. At all relevant times, its function was to "coordinate import and export business in Chinese and Western medicines" by implementing government policies and regulations under "the guidance and supervision of the responsible departments under the Stat[e] Council." CAJA412 (Chamber statement, 2003). "Coordinating price, market and clients of foreign trade" were among these responsibilities. *Id.*

The Chamber is one of several chambers overseen by the Ministry. As the United States has explained, "China's Chambers of Commerce are organizations representing private members that also function as entities under MOFCOM's direct and active supervision and, accordingly, play a central role in regulating the trade of China's industries." First Written Submission of the United States of America, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398 ¶ 207 (June 1, 2010), *available at* goo.gl/sxyv43 ("US-WTO Submission").

3. In 1997, the Ministry instituted a regulatory system for the production and export of Vitamin C. In conjunction with the State Drug Administration, it issued the "1997 Notice," JA89-97, under which Vitamin C production was to be "strictly controlled." JA90. Under the Notice, the Chamber was to estab-

lish a "Vitamin C Coordination Group," later known as the Vitamin C Subcommittee. The Subcommittee was a branch of the Chamber, not a separate entity. JA80. Its main responsibilities were "to coordinate with respect to Vitamin C export market, price and customers." JA92. Its members were the four major Chinese Vitamin C manufacturers, Northeast Pharmaceutical Group Co., Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and Respondent Hebei Welcome Pharmaceutical Co., Ltd. ("Welcome"), JA422, and it was chaired by an officer of the Chamber, Mr. Qiao Haili. The four companies were all required to participate in the Subcommittee "and subject themselves to the coordination of the Group." JA92.[2]

The Subcommittee's 1997 charter conformed to the Ministry's directive. It explained that the Subcommittee was to "coordinate and administ[er] market, price, customer and operation order of Vitamin C export," and to "hold . . . working meetings for Vitamin C export to exchange information, summarize and communicate experience, analyze and work out coordinated prices for Vitamin C export, to supervise and inspect the implementation of such coordinated export prices [set] by the Sub-Committee." JA82-83. For violations, members were subject to "warning [and] open criticism" – a severe penalty in the Maoist

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[2] Respondent North China Pharmaceutical Group Corp. ("NCPG") is a state-owned holding company and the indirect parent corporation of Welcome. CAJA195. It consistently disputed the personal jurisdiction of the U.S. courts over it, as well as any liability for Welcome's Vitamin C activities. CAJA195-98. The court of appeals had no need to reach the issues specific to NCPG given its disposition of the case. Pet. App. 2a n.2.

system of governance[3] – and to the risk of cancelling their ability to export. JA85-86.

The Subcommittee was also responsible for the Chamber's "export administration." Specifically, it was required to "supervise the implementation of export license[s] by member enterprises and advis[e] on allocation and adjustment of [export] quota, and issuance of export license." JA82.

4. Beginning in 2002, the means of *enforcing* price coordination changed, but the requirement that the companies coordinate export prices through the Chamber and the Subcommittee did not.

In December 2001, anticipating the forthcoming changes, the Chamber convened a meeting of the four manufacturers. As directed by the Chamber, the companies agreed to export volume limitations and the Chamber made clear that "[t]he committed export volume as part of the industry self-discipline shall be strictly implemented," adding that companies "not in strict compliance with this requirement will be punished by the Vitamin C Sub-Committee." JA459.

"Self-discipline" is a "regulatory process that is well-understood and applied broadly in China." JA138. "That process, by design, involved communications among the relevant parties with a goal of seeking agreement on a unified course of action that would implement the mandatory goals of Chinese policy[.]" JA138-39, 174-78. *Accord* US-WTO Submis-

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[3] *See* Freeman Spogli Institute for International Studies, *Introduction to the Cultural Revolution*, SPICE DIGEST, Fall 2007, at 1 ("Mao favored open criticism and the involvement of the people to expose and punish the members of the ruling class who disagreed with him[.]"), *available at* goo.gl/dvpwYo.

sion ¶¶ 205, 216-17; Bruce M. Owen *et al.*, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 248-49 (2008) ("[U]nder the practice of 'industrial self-discipline,' the major companies in an industry reach price agreements or other agreements to limit competition, in an effort to stabilize the market."); Wang Xiaoye, *The Prospect of Antimonopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 201, 208 (2002) ("One always should view 'industrial self-discipline prices' as a synonym for government intervention in price competition among enterprises.").[4]

Soon after the December 2001 meeting, the Ministry superseded its 1997 Notice with a 2002 Notice issued jointly with the General Administration of Customs ("Customs"). JA98-101. It provided:

- The objective was "to adjust the catalogue of export products subject to price review by the customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions . . . , promote industry self-discipline and facilitate the healthy development of exports." JA99.
- Vitamin C and 29 other products were now subject "to price review by the customs" under a "Price Verification and Chop ('PVC')" procedure. *Id.*

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[4] *Cf.* Container Owners Ass'n, *Chinese box manufacturers commit to waterborne coatings* (2016), *available at* https://goo.gl/hRP3tN (manufacturers agreed under industrial self-discipline to switch to more environment-friendly waterborne coatings).

- "[T]he relevant chambers must . . . submit . . . information on industry-wide negotiated prices for those export products subject to price review[.]" JA99-100.
- "The adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline." JA100.

The 2002 Notice was followed by a "2003 Announcement" detailing the PVC procedure. JA102-06. The 2002 Notice had given the various chambers and Customs the ability to "suspend export price review for certain products" if the relevant subcommittee members approved. JA100. This provision, which was never invoked, was not continued in the 2003 Announcement. JA102-06.

The 2003 Announcement provided that: (i) the Chamber "shall be responsible for implementing" the PVC system; (ii) exporters were to specify in the contracts "the prices and quantities"; (iii) the Chamber was required to "verify the submissions . . . based on the industry agreements," "affix V&C chop to the conforming applications," and send them back to the companies for transmission to Customs. JA104-06.

In connection with the 2003 Announcement, the Chamber revised its Charter. JA53-78. It continued as "a national-wide and self-disciplined social entity voluntarily organized . . . with objectives of the trade coordination and service." JA53. "The objective of the Chamber of Commerce is to coordinate and guide the import and export of medicines and health products[.]" JA54. Its duties continued to include the obligation to "jointly maintain the order of the import and export [and to] coordinate the import and export prices, market and clients." JA55.

The Subcommittee also revised its charter and administrative rules. One change was that, in addition to the four major Vitamin C manufacturers – who were now referred to as "Council Members" and "Member Organizations"; JA197, 461 – the Subcommittee added 11 non-manufacturer export trading companies and smaller manufacturers as "member enterprises." JA462-63; CAJA2216-17. Their addition was consistent with the elimination of the discretionary (or "non-automatic") license requirement for exporters. *See* pp. 12, 16, 40 below.

The Subcommittee's coordination duties continued as before. The new Charter provided that the Subcommittee would continue to "coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry," as well as to "maintain the normal order for vitamin C" exports, and to "protect the interests of the state, the industry and its members." JA183 (art. 8). It confirmed that: "The Subcommittee will discipline members [for] . . . [f]ailure to carry out industrial agreements[.]" JA467-68. Consistently, the Ministry's formal approval in 1997 of the Chamber's Vitamin C Subcommittee, JA79-80, including the obligation to "coordinat[e] the Vitamin C export market, price and customers of China," JA79, was never superseded and continued in full force and effect. JA420.[5]

The revised Charter also said that the Subcommittee was "a self-disciplinary industry organiza-

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[5] Petitioners' assertion that the 2002 Notice "abolished" the requirement to fix prices, Pet. Br. 8, is unsupported and inaccurate. The 2002 Notice unambiguously required companies to coordinate and arrive at industry-wide negotiated prices as part of industry self-discipline. JA99-100.

tion jointly established on a voluntary basis," JA182, and that members had a right "to freely resign." JA186. Council members, however, including the four leading manufacturers, were selected to four-year terms, JA190, 197, and there was no provision allowing a Council member to resign its post. Thus, as "a practical matter," none of the four major manufacturers could abandon participation. JA431. And none ever did.

Exporters who were not members of the Subcommittee were bound by the same PVC procedures. JA106 ("For V&C applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters."). Consequently, all exporters were required to adhere to the coordinated prices set by the Chamber's members.

Under the revised 2002 regime, as before, export prices were not set by the Ministry or the Chamber; they were largely "fixed by enterprises without government intervention." Pet. Br. 10. What China continued to require was that the companies themselves fix the prices under the supervision of the Chamber and its Subcommittee; the obligation was to reach "voluntary" agreements on prices through industrial self-discipline. JA139. The prices agreed on were up to the companies so long as they exceeded anti-dumping minima. JA175-77 ("Properly understood, what the government is compelling is the active participation of the industry in a mandated process which must be obeyed."); *see* JA105, 183.

The changes from the 1997 regime to the 2002 regime were modest. Non-manufacturing trading companies and smaller manufacturers could join the Subcommittee, and several did. Members were permitted to resign; but there is no evidence that any ev-

er did, and non-members were bound by the same requirements in any event. The major change was that export quota restrictions and non-automatic licensing were eliminated and replaced by the PVC system. JA167-68, 428-30; CAJA3898-99; *see also* CAJA2012. What did *not* change was the requirement to fix prices. The companies remained obligated under PVC to engage in industrial self-discipline, to accept the price coordination managed by the Chamber, and to report industry-wide negotiated prices under Chamber guidance. Price coordination through industrial self-discipline thus continued as before. *See* CAJA2154.

5. Price-fixing agreements are notoriously difficult to monitor and enforce, *see* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 44-48 (1964), and that is especially so in a developing nation where the government had controlled all aspects of production until the recent past.

Still, PVC *was* enforced. The Chamber denied chops to nonconforming contracts, JA434-35, and directed production limitations to stabilize prices. JA435. In a few instances, manufacturers initially did not follow a requirement to curtail production, but they were later brought into compliance. JA180-81, 435-36. Contracts were inspected by the Chamber, which "refused to affix our chop to nonconforming contracts." JA436; *see* CAJA1767-68.[6]

6. China "acceded" to the World Trade Organization in 2001. In doing so, it "gave up export ad-

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[6] Petitioners assert that PVC was not "mandatory" because many of the contracts produced in discovery had no chop. Pet. Br. 11. But the process was for the companies to transmit the chopped contracts to Customs. JA105; Pet. App. 244a. No discovery was taken from Customs.

ministration" of Vitamin C. JA319. China did not give up the requirement of industry self-discipline, nor the companies' obligation to reach industry-wide price agreements under Chamber coordination. The "export administration" China abandoned, instead, was the regime of export quotas and non-automatic export licensing for Vitamin C that China had followed prior to 2002. *Id.*; JA90, 160, 162, 165, 428-29.

That is what the United States and the WTO themselves concluded. *See* US-WTO Submission ¶¶ 90-109. The WTO's trade reviews all determined that what China had given up in abandoning export administration was non-automatic licenses and exporter quotas, not price coordination by the Chambers. *See* WTO, *China Trade Policy Review 2006*, WT/TPR/S/161, at 104 ¶ 141 & n.120 (Feb. 28, 2006), *available at* goo.gl/H97MgH ("On 1 January 2002, China abolished export quotas and licences for . . . Vitamin C."); WTO, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, G/C/W/438, at 2-3 ¶ 5(a) (Nov. 20, 2002), *available at* goo.gl/uu7k71. Contrary to the arguments of Petitioners and some of their *amici*, *e.g.*, Pet. Br. 9, 19, 53, China's representation to the WTO that it was giving up export administration of Vitamin C was thus entirely consistent with its continued requirement of price-fixing.

7. Subsequent WTO proceedings involving Raw Materials and a similar Chamber of Commerce confirmed that, throughout the class period, price-fixing of these materials, as well as Vitamin C, was required by China – a conclusion reached not only by China, but by the WTO, the United States, the European Union, and Mexico as well. *See* JA676-77, 722.

The upshot is that every independent entity that has analyzed the issues – other than the district court below – has concluded that China continued to mandate price-fixing for commodities subject to the PVC procedure throughout the class period in this case: the United States, the European Union, Mexico, the court of appeals below, and even another federal district judge in a different case.[7]

Plaintiffs themselves concede the continuation of mandated price-fixing under the 2002 regime. In the court below, Plaintiffs said that Chinese law "required the Chamber and its Subcommittee to 'actively coordinate to set vitamin C export prices and quantities.'" Brief for Plaintiffs-Appellees at 25.[8] And in this Court, Plaintiffs similarly acknowledge that: "On paper, 'verification and chop' required exporters to submit vitamin C export contracts to the Chamber, which was then supposed to affix a seal (or 'chop') if the contract met or exceeded an industry-determined minimum export price." Pet. Br. 8.

As the preceding discussion demonstrates – without even citing the Ministry's submissions – the regulations themselves make clear that Chinese law compelled price-fixing throughout the class period. The Ministry's submissions confirming that fact are discussed below.

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[7] *Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 421-64 (D.N.J. 2010), *vacated & remanded on other issues*, 654 F.3d 462 (3d Cir. 2011). The district court in this case "disagree[d] with the approach taken in *Animal Science*." Pet. App. 105a.

[8] Petitioners have complained that this passage is taken out of context. Pet. Supp. Br. 10. It is not. The full context is appended as Annex A.

C. Proceedings Below

1. Petitioners' class action complaint was filed on January 26, 2005, in the Eastern District of New York, and subsequent cases were centralized there by the Judicial Panel on Multidistrict Litigation. The principal allegations were that Respondents had fixed the price of Vitamin C exports from China from December 2001 through June 30, 2006. JA13, 52.

Respondents moved to dismiss on the basis of sovereign compulsion, act of state, and international comity. JA19-20. The motion was supported by an *amicus* brief by the Ministry, Pet. App. 189a-223a, which, as the district court noted, was "unprecedented. [China] has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case." *Id.* 168a. The *amicus* brief was accompanied by a sworn declaration with authenticated copies of the relevant legal materials with certified translations that provided the evidentiary basis for the legal statements in the brief. JA21.[9] That filing was followed by another official statement of the Ministry confirming the accuracy of the positions taken in the *amicus* brief. JA131-33.

The motion to dismiss was denied. The district court (Trager, J.) concluded that the Ministry was "entitled to substantial deference, but [its brief] will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly

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[9] The United States is therefore mistaken to claim that there had been no "sworn evidentiary proffer" in support of the Ministry's position. *See* U.S. Br. 24.

contradicts the Ministry's position." Pet. App. 181a. The Ministry had presented logical and consistent explanations of what the Chinese regulatory regime required – that the companies enter into voluntary agreements on price, subject to the coordination and supervision of the Chamber and its Subcommittee. *See* JA248-50; Pet. App. 205a-06a, 208a-09a. Nevertheless, the court concluded that the concepts of "self-regulation," "self-restraint," and "voluntary" participation rendered it unclear "from the record at this stage of the case whether defendants were performing a government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens." Pet. App. 185a.

2. In November 2009, Defendants moved for summary judgment, JA29, supported by a third formal submission from the Ministry. JA247-51.

The district court (Cogan, J.) denied the motion on the papers, without hearing oral argument from the parties or the Ministry. The court did not apply a "substantial deference" standard to China's submissions. *Cf.* Pet. Br. 3. Instead, the court simply "decline[d] to defer to the Chinese government's statements to the court regarding Chinese law." Pet. App. 56a, 118a-19a.[10] The court asserted that, "when the alleged compulsion is in the defendants' own self-interest, a more careful scrutiny of a foreign government's statement is warranted." *Id.* 121a. It said that the 2009 statement was "particularly undeserving of deference," *id.* 119a, and "suggest[ed] that the

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[10] The court made one exception, deferring to "the Ministry's explanation of the relationship between the Ministry and the Chamber." Pet. App. 118a.

Ministry's assertion of compulsion is a post hoc attempt to shield defendants' conduct from antitrust scrutiny." *Id.* 121a.

The court asserted that the positions taken by Respondents and the Ministry were inconsistent with China's representations to the WTO that it had given up "export administration" of Vitamin C. *Id.* 74a, 120a-21a, 123a, 136a. The court, however, never examined what "export administration" meant – ignoring that it meant *only* non-automatic licensing and export quotas, as the United States and the WTO had confirmed. *See* p. 12 above.

Bypassing the Ministry, the district court offered its own construction grounded in its own instincts rather than any identifiable principles of Chinese law. For example:

- Despite the explicit written requirement that exporters could not export unless they reported the "industry-wide negotiated prices" to the Chamber, the court concluded that "defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance." *Id.* 125a.
- As to the provision in the 2002 Notice allowing *Customs and the Chambers* to suspend price review with the approval of the members, the court elected to "interpret [it] as granting *defendants* the *unilateral* authority to suspend verification and chop." *Id.* 123a-24a (emphasis added).
- "Although the 2003 Announcement does not contain a similar explicit suspension provision, I construe the 2003 Announcement as granting defendants the same power" to suspend PVC. *Id.* 124a-25a.

- The court concluded that the 2002 regime did not cover output restrictions even though "the term 'industry agreements' in the 2003 Procedures is broad enough to also include agreements on output restrictions." *Id.* 126a-27a.
- "[I]f all the members simply resigned from the Subcommittee . . . there would be no price or output restrictions that [non-members] would be required to follow." *Id.* 135a.

Notwithstanding its acknowledgement that, "to receive a chop under the 2002 PVC Notice and 2003 Announcement, an export contract was . . . required to comply with the industry-agreed minimum price," *id.* 126a, the district court concluded that compulsion was not proven because China did not dictate the specific prices to be set, and defendants' agreements on prices above a specified minimum went "beyond the scope of any potential compulsion." *Id.* 106a, 139a-42a. The court understood that Chinese law and custom are "something of a departure" from the constructs of Western society, *id.* 116a-17a, but proceeded to evaluate China's regulatory system by treating translated Chinese terms of art without regard to their meaning and usage in Chinese law. In particular, the court construed "industrial self-discipline" as implicating purely private, unilateral conduct, directly contrary to the term's actual meaning under Chinese law, custom, and practice. *Id.* 152a; *see also id.* 83a n.17, 120a n.39; JA138-39.

The court recognized that its rulings were inconsistent with the WTO proceedings in the Raw Materials matter, *id.* 136a-39a, and with the New Jersey district court decision in *Animal Science*, *id.* 105a-106a, but was undeterred.

3. Following class certification, trial was held from February 25, 2013 to March 14, 2013. Respondents' ability to defend themselves at trial was constrained. The Ministry's submissions and applicable Chinese regulations were excluded from evidence. Respondents proposed to have a former Ministry official, Qiao Haili, offer a detailed description of the Chinese regulatory regime in which the businesses operated (supported by copies of the regulations) and explain how the Ministry compelled the conduct at issue. JA411-39. Mr. Qiao proposed to testify to the creation of the Chamber and Sub-Committee, the history of Chinese Vitamin C regulation, how the Sub-Committee and Chamber operated under the guidance of the Ministry to effect Chinese policy goals, and how the system of "self-discipline" was a mandatory aspect of the Chinese regulatory regime. JA413-38. The district court, however, excluded much of this evidence, leaving only a shell of Mr. Qiao's proposed testimony. CAJA, at SPA178-88, 216-40.

Following settlements with the other defendants, the jury found Respondents liable for violating the Sherman Act. After post-trial motion practice, including an award of attorneys' fees and costs and offsets for settlement monies received, the judgment awarded the Damages Class monetary relief (including attorneys' fees and costs) of $147,831,471.03 plus post-judgment interest, and an injunction barring Respondents from coordinating prices for Vitamin C without regard for any potential contrary commands of the Chinese government. JA50-51.

4. Explaining that "China has attached great importance to this case," China submitted a formal protest of the district court's rulings in the form of a

diplomatic note to the U.S. Department of State. JA782-84.

5. The Court of Appeals for the Second Circuit vacated the judgment with instructions to dismiss the complaint. Pet. App. 1a-38a. In a unanimous opinion by Judge Hall (joined by Judges Cabranes and Wesley), the court held that the district court abused its discretion by denying deference to the Ministry's formal submissions, and by declining to abstain from exercising jurisdiction on international comity grounds. Citing *United States* v. *Pink*, 315 U.S. 203 (1942), the court ruled that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 11a, 25a.

The court of appeals applied the international comity balancing test developed by the circuit courts in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). The court analyzed the Ministry's submissions and concluded that its reasonable explanation of the regulatory system, together with the record available at the motion to dismiss stage, established conclusively that it was impossible for Respondents to comply with both Chinese law and the Sherman Act. Pet. App. 27a-33a. The court also determined that the district court's construction of the system was "nonsensical" and erroneous in several respects apart

from the refusal to give any deference to the Ministry's submissions. *Id.*; *see* pp. 45-46 below. Having found a conflict between U.S. and Chinese law, the court concluded that the remaining comity abstention factors "decidedly weigh[ed] in favor of dismissal and counsel[ed] against exercising jurisdiction in this case," Pet. App. 34a, a point which Petitioners did not contest.[11] It thus vacated the judgment with instructions to dismiss. Rehearing was denied without recorded dissent.

6. Petitioners sought certiorari, and their petition was granted on January 12, 2018, limited to the question (no. 2) of the appropriate level of deference to be given to the Ministry's submissions.

SUMMARY OF ARGUMENT

1. The standard for deference unanimously adopted by the court of appeals is correct. The court analyzed the applicable Chinese regulatory provisions and concluded that China's formal interpretation was reasonable and worthy of deference. Its standard, which could be summarized as "defer if reasonable," is consistent with FED. R. CIV. P. 44.1, and with this Court's decision in *Pink*. This Court has invariably deferred to the formal statements of foreign governments about their own laws, and there is no reason to depart from that course here.

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[11] Petitioners argued only one aspect of the comity analysis before the court of appeals, *viz.*, whether there was a conflict between the Sherman Act and Chinese law. Petitioners did not argue that any of the other recognized comity factors weighed in their favor. Brief for Plaintiffs-Appellees at 45-46 (attached as Annex B).

The no deference (or effectively *negative* deference) approach deployed by the district court and advocated by Petitioners violates important international comity principles and risks excessively entangling the federal courts in matters of foreign affairs. The amorphous and ill-defined proposals by various *amici* supporting Petitioners do no better, for they would inject tremendous uncertainty into litigation over the meaning of foreign law and invite district courts to impose American-style legal analysis on foreign regimes whose cultural contexts and legal norms may differ radically from our own.

2. The Ministry's construction of its own regulatory system was accurate, and indeed is the only coherent interpretation of that regime. As the regulations specified, and as the Ministry explained, Vitamin C exporters were required by China to fix prices – to "coordinate" prices as a matter of "industry self-discipline" under the supervision of the Chamber. That view of China's regulatory regime was confirmed in related WTO proceedings involving Raw Materials. There, the United States, Europe, and Mexico, all agreed – relying on the Ministry's submissions *in this case* – that China required exporters "to export at set or coordinated export prices or otherwise face penalties." The WTO, also relying on the Ministry's submissions, concurred.

3. Petitioners' request to reinstate the district court's comity ruling has no merit. Wholly apart from the district court's erroneous and disrespectful deference standard, the court of appeals correctly rejected the district court's key rulings, concluding that the court's construction of China's regulatory system was "nonsensical."

4. Irrespective of the level of deference to the Ministry, the judgment should be affirmed. The only issue on comity abstention below was whether there was a true conflict between the requirements of Chinese law and the Sherman Act. The existence of conflict was established not just by the Ministry, but by the regulations themselves and their requirement that Vitamin C exporters coordinate their prices through industrial self-discipline.

China's requirement that competitors coordinate their prices compelled a *per se* violation of the Sherman Act in direct conflict with U.S. law. As conflict was the only comity issue contested below, this Court should affirm the judgment of the court of appeals.

ARGUMENT

I. THE SECOND CIRCUIT'S DEFERENCE STANDARD IS CORRECT AND CONSISTENT WITH RULE 44.1

A. The Second Circuit's limited holding is consistent with this Court's controlling precedent and Rule 44.1

1. The Second Circuit held that, when presented with the official statement of a foreign sovereign "regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 25a. This modest holding appropriately balances judicial independence against the principles of international comity, reflecting the respect owed to exercises of sovereignty by other nations. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 33, 37-38 (8th ed. 1883).

The Second Circuit found that the Ministry was the "highest authority within the Chinese Government authorized to regulate foreign trade," Pet. App. 6a; that the Ministry provided authenticated copies of its regulations, *id.* 8a & n.6; and that the Ministry's interpretation was reasonable, *id.* 27a-28a. As the court explained, the regulations themselves "demonstrate[d] that . . . Chinese law required Defendants to participate in the PVC regime in order to export vitamin C." *Id.* 27a. Petitioners' characterization of the decision below as applying "blind deference," turning on the "bare fact of the [foreign government's] appearance," *e.g.*, Pet. Br. 22-23, 26, 34, is untenable. The court analyzed and specifically endorsed the Ministry's key conclusions.

Petitioners never say precisely what standard of deference should be applied in this case. They do, however, rely on the district court's assertions that the Ministry's statements were a "post-hoc attempt to shield defendants' conduct," Pet. App. 121a, and a "carefully crafted and phrased litigation position," *id.* 120a. *See* Pet. Br. 18-19, 34-35, 54. Petitioners thus endorse a rule of negative deference, treating a foreign sovereign appearing before a U.S. court with suspicion rather than respect. Such a rule is antithetical to the respect that the courts of this nation owe to "the independence of every other sovereign state." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

2. The court of appeals relied appropriately on *United States v. Pink*, 315 U.S. 203 (1942), in adopting its deference standard. *Pink* held that the "official declaration" of the Soviet Commissariat, which had the "power to interpret existing Russian law,"

was "conclusive" as to the meaning of a Russian expropriation decree. *Id.* at 220.

Pink cannot be distinguished from this case. First, the fact that the Commissariat's declaration was received through "diplomatic channels" was not significant in itself but rather because it proved the declaration's "authenticity and authority." *Id.* at 218, 221. The "authenticity and authority" of the Ministry's statements in this case has also been established, including through "diplomatic channels." The Ministry stated clearly that it was authorized to present the "official views of the People's Republic of China," JA131, and that authority was confirmed in China's diplomatic note to the State Department, JA782-84.

Second, the "conclusive" effect given to the Commissariat's declaration based solely on the Commissariat's "power to interpret existing Russian law," *Pink*, 315 U.S. at 220, cannot be squared with the Petitioners' claim, Pet. Br. 40, that other record evidence was somehow crucial to the decision. The Court did not cite any other evidence except for a passing observation that the "expert testimony tendered by the United States gave great credence" to its position on the Russian decree in a prior case. *Pink*, 315 U.S. at 218. Before the case reached this Court, however, the New York courts had found that the evidence established that the Russian decrees did *not* apply extraterritorially. *See Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 280 N.Y. 286, 309-11 (1939), *aff'd by an equally divided Court*, 309 U.S. 624 (1940). This Court declined to parse the evidence because Russia's contrary statement was "conclusive." (In this case, in any event, the record outside the Ministry's proffer confirms that the Ministry's explanation was correct. *See* pp. 4-11 above.)

3. This Court has never deviated from the clear rule of deference established in *Pink* more than 75 years ago. Petitioners identify no case where this Court has rejected (or even questioned) a foreign government's explanation of its own law, and research has identified none. This Court has consistently framed its holdings to accord with the explanations of foreign sovereigns, implicitly treating them as correct. *See Abbott v. Abbott*, 560 U.S. 1, 10-12, 14-15 (2010); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 98-99 (2002); *Doe v. United States*, 487 U.S. 201, 218 n.16 (1988); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 866-67 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.").

The cases cited by Petitioners and their *amici* are not to the contrary. *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*) involved the trial testimony of an attorney in Cuba's Foreign Trade Ministry, not an official statement by the Cuban government. 462 U.S. 611, 616 n.3 (1983). Regardless, the Court did not dispute the witness's testimony that Bancec had "independent legal status" under Cuban law, *id.*, but found that choice of law principles dictated that Cuban law should not apply to an expropriation claim not arising under Cuban law. *Id.* at 621-23. Similarly, in *Intel Corporation v. Advanced Micro Devices, Inc.*, the Court did not dispute the European Commission's description of its powers and role within the EU legal system. 542 U.S. 241, 254-55 (2004). The Court rejected only the Commission's view of the significance of those facts

under U.S. law, finding that based on its own description the Commission was a "tribunal" as the term is used in 28 U.S.C. § 1782. 542 U.S. at 258.

4. Both *Pink* and the decision below are consistent with FED. R. CIV. P. 44.1.

There is nothing in the text or history of Rule 44.1 that suggests it was intended to alter or overrule *Pink*. Nor is there any conceptual incompatibility between the general obligation of courts to determine foreign law under Rule 44.1 and rules that focus courts' discretion in doing so.

Rule 44.1 was designed to end unpredictable factual inquiries in favor of more orderly resolutions made as a matter of law. *See* FED. R. CIV. P. 44.1 advisory committee note. There is no incompatibility in saying that, within the determination of this question of law, all sources should be considered but the official submission of a foreign government should be followed if not unreasonable. In fact, fashioning clear rules for the weight afforded to specific types of sources is fully consistent with the fact that the Rule 44.1 inquiry is a determination of law reviewed *de novo* on appeal, not a factual determination involving weighing evidence and assessing credibility.

5. Each of the appellate cases cited by Petitioners is consistent with the Second Circuit's holding that conclusive deference is due only when a foreign government appears before a U.S. court and presents an official governmental explanation of its domestic law that is reasonable. *See United States v. McNab*, 331 F.3d 1228, 1233-35, 1240-42 (11th Cir. 2003) (district court properly deferred to initial Honduran government interpretation; court of appeals declined to overturn judgment based on new and inconsistent

Honduran interpretation received post-judgment); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (crediting Iran's affidavits but observing that they described no binding requirement under Iranian law), *vacated*, 320 F.3d 280 (D.C. Cir. 2003); *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (declining to defer to a Mexican agency circular where the Mexican government did not appear, and it was unclear whether circular applied given legal changes post-dating the circular).

6. The approach adopted by the Second Circuit is also eminently practical. As one commentator has observed:

> Holding that U.S. courts can second guess the highest administrative authority of a foreign state on interpretations of that state's law would raise serious practical problems. Most obviously, it would create difficulties for the regulated entities, who face the possibility of being told by a foreign regulator that they must do x and then being told by a U.S. court that the foreign regulator misunderstood its own domestic law and that they should not have done x.

Daniel A. Crane, *The Chinese Vitamins Case: Who Decides Chinese Law?*, COMPETITION POLICY INT'L, at 4 (March 2018), *available at* goo.gl/J9wKp8. The Second Circuit's rule thus helps avoid the inconsistent obligations that would likely arise if the federal courts routinely second-guessed foreign regulators' interpretations of their own laws.

B. International comity principles counsel a strong standard of deference for foreign sovereigns

1. International comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). This recognition is not an "absolute obligation," but neither is it, as Petitioners suggest, a voluntary extension based on "mere courtesy and good will." *Id.*; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (arbitration clause in international agreement enforceable due to "concerns of international comity . . . even assuming that a contrary result would be forthcoming in a domestic context").

International comity is not a "vague political concern favoring international cooperation when it is in our interest to do so"; it is also motivated by promoting "reciprocal tolerance and goodwill." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). Comity requires more than merely "prioritiz[ing] accuracy, reliability, and judicial independence." Pet. Br. 44. It requires also respect for the knowledge that foreign sovereigns have about their own laws. *See In re Oil Spill by the Amoco Cadiz Off the Coast of France*, 954 F.2d 1279, 1312 (7th Cir. 1992). It would be anomalous to respect a foreign government while disrespecting the formal representations it makes before U.S. courts. Accordingly, this Court has in other contexts granted

very substantial deference to the reasonable explanations of foreign sovereigns. *See Pimentel*, 553 U.S. at 866-67 (comity requires that U.S. defer to a nation's non-frivolous assertions of sovereign immunity); p. 25 above. There is no justification for withholding similar treatment for foreign sovereigns' explanations of the meaning of their own laws.

A strong deference rule in cases like this one thus "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in relevant part). Failing to credit a foreign sovereign's reasonable explanation of its own laws, particularly where that explanation reveals a true conflict of law, can be an "act of legal imperialism" that increases friction between nations, impairing the application of U.S. law and the promotion of U.S. interests. *Empagran*, 542 U.S. at 169; *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (noting "presumption that United States law governs domestically but does not rule the world").

2. Petitioners misplace reliance on two regional treaties – to which the United States is not a signatory – that simply create a common, non-exclusive mechanism for sharing information. The treaties do not address the official statement of a foreign sovereign as to the meaning of its own laws; they instead focus on the treatment of information shared through treaty channels – information that may come from any number of sources, including private lawyers, experts, academics, judges, and other unspeci-

fied but non-binding avenues of finding foreign law.[12] And both treaties make clear that they merely establish a baseline that does not displace any other rules or standards that signatories may have implemented for considering questions of foreign law.[13]

There is no inconsistency in affording greater deference when a government asserts its sovereignty by making the affirmative decision to appear in a litigation to correct or forestall a misunderstanding of its laws than when responding less formally under treaties such as these. If the call of international comity on "each nation state . . . to 'respect the independence and dignity of every other'" is to have meaning, it must matter greatly when one sovereign appears in the courts of another to explain in official terms what its own laws require of its own subjects in its own territory. *Bolivarian Republic of Venez. v.*

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[12] *See, e.g.*, The European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154 (allowing states to delegate responsibility for replies to private bodies); Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, 1439 U.N.T.S. 111 ("Inter-American Convention") (the nation providing information "shall not be held responsible for the opinion expressed nor shall it be required to apply the law, or cause it to be applied, in accordance with the content of the reply provided"). The same is true of the Hague Conference proposal cited by Petitioners. *See Response of the United States of America to Feasibility Study on the Treatment of Foreign Law Questionnaire*, Preliminary Doc. No. 25 (Oct. 2007) at 14-15, *available at* goo.gl/SjC31Z (suggesting mechanisms such as a "panel of experts" and the use of "informal channels" for communications between the judiciary of different countries).

[13] Explanatory Report to the European Convention on Information on Foreign Law ¶ 4, E.T.S. No. 062 (1968), *available at* goo.gl/tWqn4m; Inter-American Convention, art. 8.

Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319-20 (2017) (quoting *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U.S. 562, 575 (1926)).

3. Petitioners' comparison to treaty interpretation generally also fails. There are good reasons to grant a higher degree of deference in this case than the "great weight" that this Court has given to Executive Branch interpretations of treaties. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). First, treaties are bilateral agreements between sovereigns, and the parties to a treaty may disagree as to the interpretation of its provisions. This case concerns a sovereign's explanation of its unilaterally enacted legislation. Second, treaties are agreements to *cede* a degree of sovereignty in exchange for some benefit. Lawmaking is an *exercise* of sovereignty, and thus a foreign government may rightly expect a higher degree of deference when explaining the meaning of its laws.[14]

4. Petitioners' analogies to domestic contexts fail to capture the relevant international concerns.

As the United States points out, deference rules for U.S. administrative agencies do "not readily translate" to the present context. U.S. Br. 20. Petitioners nevertheless attempt to impose the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the ceiling for deference to a foreign sovereign. Pet. Br. 48-

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[14] Petitioners wrongly suggest that the Second Circuit's holding requires courts to give greater deference to foreign agencies than to the U.S. Department of State as to the meaning of treaties. Pet. Br. 51 n.16. The decision below is limited to a foreign sovereign's explanations of its domestic law. Pet. App. 11a-12a, 34a.

55. *Chevron* deference, however, is based on respect for the division of powers among coordinate branches of the same government. By contrast, the deference afforded to a foreign government as a matter of international comity derives from respect for its independent sovereign authority. *Hilton*, 159 U.S. at 163-64; *see Access Telecom*, 197 F.3d at 714 (rejecting argument that *Chevron* directly bore on the question of deference to a foreign agency). If *Chevron* has any relevance here, it is because it would be anomalous to give less respect to a foreign sovereign's direct exercise of independent sovereignty than to an administrative agency's domestic exercise of delegated rulemaking authority. *Amoco Cadiz*, 954 F.2d at 1312 ("Giving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable.").

Petitioners' comparison to deference rules for state governments fares no better. Petitioners are incorrect that this Court has held that the Constitution requires federal courts to give greater respect to state governments than to foreign sovereigns. The authority they cite, *Bond v. Hume*, concerns only "the relation of the several states *to each other*." 243 U.S. 15, 22 (1917) (emphasis added). In any case, Petitioners concede that constructions of state law made by the highest court of a state receive conclusive deference in U.S. federal courts. Pet. Br. 56; *accord* U.S. Br. 27 ("binding").

Deference rules for state governments provide no support for the no deference rule Petitioners urge here.[15]

C. Deference is particularly appropriate in this case because it implicates a conflict between sharply divergent economic and trade regimes properly reserved for resolution by the political branches

1. A high degree of deference to foreign sovereigns' reasonable explanations of their own laws is necessary to avoid interference with the international relations prerogatives of the political branches. This Court has held in many contexts that separation-of-powers concerns and recognition of the limits of the judiciary's institutional competence warrant great care to avoid negative foreign policy consequences. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); *see also Sosa*, 542 U.S. at 727 (recognition of new claims under the Alien Tort Statute); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (act of state doctrine); *McCulloch v. Sociedad*

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[15] The standard of deference advocated by the United States appears to be one of substantial deference, but the government adds a long list of factors that render its ultimate standard unclear. U.S. Br. 16-21. Such a vague standard would give district courts no guidance and would undermine Rule 44.1's objective of clarity and consistency. *Cf.* Benjamin G. Bradshaw, *et al.*, *International Comity in the Enforcement of U.S. Antitrust Law in the Wake of In re Vitamin C*, 31 ANTITRUST 87, 90 (Spring 2017) (praising "clarity" of Second Circuit's approach). The U.S. Chamber articulates a standard of "substantial deference." Provided that the foreign sovereign's construction of its own laws is "reasonable," Pet. App. 25a, or "not frivolous," *Pimentel*, 553 U.S. at 866-67, a substantial deference standard should require that construction to be followed – just as the court of appeals did here.

Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (application of the National Labor Relations Act). The case for deference to the political branches concerning "delicate field[s] of international relations" is at its strongest where "the possibilities of international discord are . . . evident and retaliative action . . . certain." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

The extraterritorial application of U.S. antitrust laws implicates "a foreign nation's ability independently to regulate its own commercial affairs," a sensitive aspect of international relations. *Empagran*, 542 U.S. at 165; *see also Timberlane*, 549 F.2d at 612. And, as this case demonstrates, the risk of international discord is particularly acute when U.S. antitrust law is applied to conduct required under foreign law. The district court's disrespectful treatment of and refusal to grant *any* deference to the Ministry triggered an immediate diplomatic response: the Chinese government formally protested its treatment in a diplomatic note to the U.S. Department of State that emphasized the "great importance" that China attaches to this case and to the degree of respect that its official statements receive in foreign courts. JA782-84. A Ministry spokesperson hinted at broader economic consequences as well, stating that the district court ruling would "cause problems for the international community and international enterprises" and predicting an "increase of international disputes" that "will eventually harm the interests of the United States." CAJA1666; *see also* CAJA1667-72, 1678-79. If the United States wants China to change its regulatory system for exports, that is a matter for diplomats, not a private class action.

2. Dissatisfaction with the manner in which China has chosen to regulate Vitamin C exports is not a basis for refusing deference. "[T]he courts of one country [should] not sit in judgment on the acts of the government of another, done within its own territory." *Underhill*, 168 U.S. at 252.

Refusing deference on that basis would also be short-sighted. In 1916, our Federal Trade Commission recommended that U.S. exporters be permitted to fix export prices in order to compete more effectively internationally. FED. TRADE COMM'N, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 8-9, 379-81 (1916), *available at* goo.gl/hMHbmG. Acting on that recommendation, Congress passed the Webb-Pomerene Act, 15 U.S.C. §§ 61-66, which authorizes (but does not require) registered U.S. associations engaged solely in export trade to fix export prices under an exemption from the antitrust laws. *See United States v. Minn. Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950). The United States has also chosen in a variety of contexts to authorize private firms to make industry-wide price and output decisions under government supervision.[16]

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[16] *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2424 (2015) (describing program under which production "allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture"); Yuliva Bolotova, *Agricultural Supply Management and Antitrust in the United States System of Agribusiness*, 17 INT'L FOOD & AGRIBUSINESS MGMT. REV. 53, 61-65 (2014) (describing government-approved private output restriction programs for dairy and potatoes), *available at* goo.gl/ar3sHf. *See also* 2 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1317-28 (8th ed. 2017) (agriculture); *id.* at 1521 (rate agreements among rail carriers), 1553 (ocean shipping).

That the United States has chosen similar substantive paths since early in the history of our antitrust laws – although quite different in their implementations – shows how China's approach is not inconsistent with our own historic precedents.

3. Deference is also important to ensure that the "the unnecessary irritant of a private antitrust action," *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 454 (2d Cir. 1987), does not create undue international friction. In the past, for example, many of our most important allies – including the United Kingdom, Canada, France, Germany, and Australia – have responded harshly to perceived excesses in enforcing U.S. antitrust laws extraterritorially. *See RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2106-07 (2016) (extraterritorial application of U.S. antitrust law has generated "considerable controversy") (quoting *Empagran*, 542 U.S. at 167).[17] These perceptions can make foreign governments less inclined to cooperate with U.S. efforts in cross-border enforcement or promoting "America's antitrust policies . . . in the international marketplace for such ideas." *Empagran*, 542 U.S. at 169; *cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) ("The Solicitor General informs

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[17] *See, e.g.*, Joseph P. Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279, 279 (1982) ("In the past few years, foreign governments have reacted with increasing vehemence towards the enforcement of U.S. antitrust laws in a number of circumstances."); Deborah A. Sabalot, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 234-72 (1982) (describing foreign blocking statutes enacted in response to extraterritorial application of U.S. antitrust law).

us" that expansive views of U.S. jurisdiction have "impeded negotiations . . . on the reciprocal recognition and enforcement of judgments"). In today's circumstances, for example, the district court's disrespect of the Ministry cannot be helpful in U.S. efforts to gain more favorable treatment for U.S. intellectual property rights from Chinese authorities. *See generally* Prepared Statement of the Federal Trade Commission, *International Antitrust Enforcement: China and Beyond*, at 14, HOUSE SUBCOMM. ON REG. REFORM, COMMERCIAL AND ANTITRUST LAW (June 7, 2016), *available at* goo.gl/ES49NN.

Petitioners speculate that "opportunistic" foreign governments might appear in litigation, either *sua sponte* or at the behest of their nationals, to "shield" foreign defendants from the application of U.S. law by "miscontru[ing] their laws" in a way that appears reasonable but would be revealed as inaccurate under closer inspection.[18] Pet. Br. 36-38. But Petitioners cannot point to an instance where anything of the kind occurred; nor do they explain why the Second Circuit's requirement that any interpretation be supported and reasonable fails to protect against such a manipulation. China's requirement of price coordination through industrial self-discipline had been in effect for many years. Chinese companies, moreover, have frequently been the target of suits in U.S. courts, even before this case was filed,

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[18] Petitioners also suggest that foreign sovereigns could "engineer" results as plaintiffs in U.S. courts that they could not achieve in their own courts. Pet. Br. 38-39. Neither *Pink* nor the decision below addresses the deference due to a foreign sovereign when it voluntarily submits its own causes of action to the jurisdiction of a U.S. court, and that question is not before this Court.

but China did not appear in any of them.[19] China's appearances below instead underscore the significance that China attaches to this case and the seriousness of the district court's disrespectful treatment.

4. Deference is particularly important in cases such as this that involve a legal system that sharply diverges from our own, with concepts (such as "industry self-discipline" and "voluntary" participation) having no close counterparts in Western legal traditions. *See* JA139-42. The district court gave token recognition to the fact that Chinese law is "something of a departure from the concept of 'law' as we know it in this country," Pet. App. 116a, and that English translations of Chinese terms of art may not accurately capture their meaning in China. *Id.* 97a. These observations should have underscored the need for deference to the Ministry. *Id.* 29a. But instead, the district court undertook its own evaluation – essentially treating the Ministry's regulations as though they were the product of U.S. law and relying primarily on the court's own view of their post-translation "plain language." *Id.* 97a, 116a-17a. *Cf. Abbott*, 560 U.S. at 20 ("Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective con-

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[19] *See, e.g., Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 332 F.3d 815 (5th Cir. 2003); *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159 (S.D.N.Y. 2001); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994); *United States v. Yi Hai Lin*, 5 F.3d 544 (9th Cir. 1993); *Miller & Co. v. China Nat'l Minerals Import & Export Corp.*, No. 91 C 2460, 1991 WL 171268 (N.D. Ill. Aug. 27, 1991); *Advance Int'l, Inc. v. China Nat'l Arts & Crafts Import & Export Corp.*, No. 90 CIV. 2070 (MBM), 1990 WL 106825 (S.D.N.Y. July 26, 1990).

sideration[.]"); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941). Unsurprisingly, that process yielded incoherent and erroneous conclusions.

II. THE MINISTRY'S CONSTRUCTION OF CHINESE LAW WAS CORRECT

A. China's construction of its regulatory system was logical and coherent

The Ministry's amicus brief on the motion to dismiss, Pet. App. 189a-223a, supplemented by its later submissions, JA127-33, 247-51, provided a common sense and coherent interpretation of the regulatory regime China had imposed. As the court of appeals said, the Ministry "reasonabl[y] explain[ed]"

> the government's expectation that private actors actively self-regulate to achieve the government's policy goals in order to minimize the need for the government to resort to stronger enforcement methods. In this context, we find it reasonable to view the entire PVC regime as a decentralized means by which the Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed upon price as the minimum export price. In short, by directing vitamin C manufacturers to coordinate export prices and quantities and adopting those standards into the regulatory regime, the Chinese Government required Defendants to violate the Sherman Act.

Pet. App. 28a. The contrary interpretation urged by Petitioners and the district court, in contrast, was "nonsensical," as it described a system that would collapse before it even began. *Id.* 27a-28a.

B. China's representations to the WTO are entirely consistent with its position in this case

1. A crucial error that has infected this case from the outset is the idea that China's representations to the WTO were inconsistent with its arguments in this case – that giving up "export administration" meant giving up industrial self-discipline and price coordination. That error was critical to the district court's decision, Pet. App. 74a, 120a-21a, and has been unfortunately repeated here by some of Petitioners' *amici*. *See, e.g.*, AAI Br. 16. By asserting that China was speaking out of both sides of its mouth, Petitioners have tried to bring this case within the rule suggested by *McNab*, 331 F.3d at 1233-35, that deference is not owed when the foreign sovereign's statements are inconsistent.

There is not and has never been any inconsistency. China never said that it had given up industrial self-discipline and price coordination when it entered the WTO. *See* p. 12 above. What it gave up was the requirement that exporters of Vitamin C be subject to discretionary licensing or company-specific export quotas. JA90, 160, 162, 165, 319, 428-29. Nothing in the WTO's trade reviews and nothing in the later submissions by the United States (or the other complainants) indicated that China had agreed to abandon industrial self-discipline or price and quantity coordination.

2. This made-up inconsistency is the only inconsistency offered by Petitioners or any of the *amici*. Because there was in fact no inconsistency at all, the arguments that the Ministry is not entitled to deference on that basis necessarily fail.

C. The WTO Raw Materials proceedings confirm the appropriateness of deference to the Ministry in this case

1. The WTO "Raw Materials" proceedings confirmed both that the requirement to fix prices continued throughout the class period, and that deference to the Ministry was appropriate.

The proceedings related to bauxite, phosphorus, and other similar materials. These products were under the auspices of a different chamber of the Ministry, the Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCCMC").

That Chamber had a variety of responsibilities, including the promotion of industry self-discipline and coordinating prices among the members. JA685-91. In those respects, its operations were identical to those of the Chamber at issue here. *See* US-WTO Submission ¶ 208.

At the WTO, the United States, Europe, and Mexico – as complainants – explained "that China coordinates export prices for the products at issue through a 'system of self-discipline' based on informal statements and oral agreements between traders and export regulators and where the CCCMC directs commodity-specific branches or coordination groups." JA676.

The only disagreement on this issue was whether, as China argued, price-fixing was only

mandated through 2008, when the PVC system ended, or whether it continued into 2010. JA677-79.[20] The WTO Panel sided with the complainants, concluding that "China require[d] exporting enterprises to export at set or coordinated export prices or otherwise face penalties" through 2010. JA722.[21]

The submission of the United States focused on how the CCCMC effectively mandated the price-fixing regime. As the United States explained, "China's Chambers of Commerce . . . play a central role in regulating the trade of China's industries." *See* US-WTO Submission ¶ 207. It identified "the coordination of export prices" as one of "the key areas in which the CCCMC coordinates export activities," adding that "the industry coordinated export price is considered 'a collective contract' that industry members must abide by." *Id.* ¶¶ 210, 217. The United States also explained how the PVC system mandated price-fixing:

> The PVC procedure requires exporters of yellow phosphorus to submit their export contracts to the CCCMC for "verification." The CCCMC is required to examine the export

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[20] Throughout the WTO proceedings, price-fixing was never disputed. One issue was whether the compulsion of price-fixing violated China's obligations under Art. XI:1 of the General Agreement on Tariffs and Trade ("GATT"). China argued that it did not, but the WTO Panel concluded otherwise. JA722-24.

[21] The Panel's factual findings were upheld by the WTO's appellate body, but the conclusions as to whether the price-fixing and some other measures violated GATT were vacated because of the lack of specificity in the complainants' original complaints. Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398 (Jan. 30, 2012), *available at* goo.gl/ZvH6AK.

> contracts and verify that the contracts comply with relevant regulations and industry coordination, including the industry coordinated export price. Where the CCCMC verifies the elements of a particular export contract, in particular the export price, are in compliance, it must affix its PVC chop (*i.e.*, its seal or stamp) to a special PVC form and to the export contract where the prices and quantities are indicated. The CCCMC must return the contract to the exporter within three days. Once the exporter receives the verified export contract bearing the CCCMC's PVC chop, it must declare the contract to Customs for clearance. Customs is required to deny clearance for any export contracts that do not bear the CCCMC's PVC chop.[22]

Id.¶ 224. The other complainant submissions were to the same effect. *E.g.*, First Written Submission by the European Union, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398 ¶¶ 356-57, 360-68 (June 1, 2010) ("EU-WTO Submission"), *available at* goo.gl/uYjFhX; JA676.

2. In this Court, the United States seeks to limit the weight of its own successful argument before the WTO. U.S. Br. 31 n.7. It argues that the "proceedings involved a different record and other

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[22] The WTO Panel endorsed the position taken by complainants but declined to address the PVC regulations on the basis that they were "outside the Panel's terms of reference" because not specified in the original complaints. JA726. The Panel based its ruling on the broad requirement to "set or coordinat[e] export prices or otherwise face penalties." JA722-24.

commodities," and that the legal standard only required proof that the price-fixing be "attributable to" China, rather than "required." *Id.* Both statements are true. Neither makes a difference.

In every relevant respect, regulation by the CCCMC was identical to regulation by the Chamber here. The CCCMC's job was to oversee mandatory price and output coordination by its members and to administer the PVC system for yellow phosphorous, functions identical to the Chamber's in this case. *See* US-WTO Submission ¶¶ 208-09. The United States identifies no material differences. Nor can it; its arguments were based largely on the Ministry's submissions about Vitamin C *in this case. Id.*

As for the "attributable to" standard, the government ignores the fact that it argued (and the WTO and other complainants agreed) that price-fixing was "attributable to China" *because it was required by China.* US-WTO Submission ¶¶ 207, 210, 217, 224. As the WTO found, "China *requires* exporting enterprises to export at set or coordinated export prices or otherwise face penalties[.]" JA722 (emphasis added).

3. At the WTO, the United States, the European Union, Mexico, and the WTO itself all relied extensively on the Ministry's amicus brief in the district court in this case. *See* US-WTO Submission ¶¶ 207-08 & *passim*; EU-WTO Submission ¶¶ 171-72 & *passim*; JA680-82, 728. In related proceedings, the District of New Jersey did so as well. *Animal Sci.*, 702 F. Supp. 2d at 426-29. No one described the Ministry's positions as self-serving, inconsistent with China's representations to the WTO about giving up export administration, or in any way biased or inaccurate. All relied on the Ministry's accurate description of China's regulatory system.

Having relied on the Ministry's explanation to advance its position at the WTO, it is unseemly for the United States now to suggest that the very same Ministry statements could be unreliable.

III. THE DISTRICT COURT ERRED IN APPROACH AND OUTCOME

1. By asserting that, where compulsion is in the defendants' self-interest, "more careful scrutiny of a foreign government's statement is warranted," and that the Ministry's statements were "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny," Pet. App. 121a, the district court effectively applied a standard of negative deference. Foreign governments rarely appear in U.S. cases, and, when they do, it is almost invariably to support the interests of their nationals. *See Empagran*, 542 U.S. at 167-68. To decline deference on that basis is to afford no deference at all.

2. Point IV in Petitioners' brief seeks to have this Court reinstate the district judge's rejection of Respondents' comity defense. Pet. Br. 57-59. They argue that footnote 10 of the Second Circuit's opinion, which they quote five separate times, reflects a determination by that court that, but for the deference standard, the district court's comity ruling was correct. Pet. Br. 3, 23, 34, 58, 59. Footnote 10 does not bear the weight Petitioners put on it and, even if it did, there would be no basis to uphold the district court's ruling.

Approving the "careful and thorough treatment of the evidence before it" is an approval of the district court's *process* (had China not appeared), not an approval of its outcome. Pet. App. 30a n.10. In fact, the court of appeals made clear that, separate from the

standard of deference, the district court's construction of the regulatory program made no sense. *Id.* 27a-28a ("It would be nonsensical to incorporate into a government policy the concept of an 'industry-wide negotiated' price and require vitamin C manufacturers to comply with that minimum price point if there were no directive to agree upon such a price."). The court added that the district court had erred in several other respects as well:

> First, it determined that whether Chinese law compelled Defendants' anticompetitive conduct depended in part on whether Defendants petitioned the Chinese Government to approve and sanction such conduct. Second, it relied on evidence that China's price-fixing laws were not enforced to conclude that China's price-fixing laws did not exist. And third, it determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict.

Id. 30a. The Second Circuit's disapproval of these errors, wholly apart from the standard of negative deference the district court employed, negate any argument that the Second Circuit intended to endorse the district court's analysis.

3. The district court's disrespectful approach should be rejected in any event.

As discussed above (pp. 38-39), the district court acknowledged that "the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of 'law' as we know it in this country — that is, a published series of specific conduct-dictating prohibitions or compulsions with an

identified sanctions system." Pet. App. 116a. Nevertheless, the court proceeded to reach conclusions inconsistent with the counsel of those in the best position to provide direction, the Ministry and the experts.[23] Contrary to the positions taken by *amici* AAI and Clarke and Howson, the difficulty of construing complex foreign regulations counsels greater, not less, reliance on the submissions of the relevant governments – the people responsible for administering the regulations – when available. *See* Stephen Breyer, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 92 (2015). The district court's faulty analysis in this case provides an excellent example.

The district court's construction of the regulatory provisions in issue rendered them incoherent. As discussed above, under the court's construction:

- The companies were obligated to report "industry-wide negotiated prices" but "defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance." Pet. App. 125a-26a.
- The 2002 suspension provision authorized the Chamber and Customs to suspend PVC, but the court found defendants had the "*unilateral*

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[23] As the court noted on summary judgment, "Plaintiffs do not have a Chinese law expert[.]" Pet. App. 59a n.5. (Petitioners offered a declaration from an American professor criticizing the weight of certain documents at the motion to dismiss stage, JA119-26, but did not offer any expert testimony on what Chinese law required at any stage.) Respondents presented expert testimony from Professor Shen Sibao and Professor James B. Speta. JA134-79; CAJA370-406. Their testimony was unrebutted.

authority to suspend verification and chop," *id.* 124a (emphasis added), rendering the Chamber's regulatory regime a nullity. The court also concluded that the suspension provision continued in 2003 despite nothing in any document or testimony to that effect. *Id.* 124a-25a.

- "[I]f all the members simply resigned from the Subcommittee. . . . there would be no price or output restrictions that [non-members] would be required to follow." *Id.* 135a.

Just as the court of appeals determined, *id.* 27a-28a, under the district court's construction, the entire regime supervised by the Ministry and the Chamber was unworkable and made no sense.

In contrast, the interpretation provided by the Ministry made perfect sense: Vitamin C exports were subject to a system under which the exporters were required to reach voluntary "industry-wide agreements" on price, without government involvement in determining the specific prices, and then submit the prices to the Chamber and Customs for verification in order to receive the "chop" required to export. The Chinese system may (and certainly does) vary from how Western nations would approach the issues, but the system is coherent, internally consistent, and achieves China's policy goals. All this is clear from reading the applicable regulations themselves – but was also carefully explained to just this effect by the Ministry. *Id.* 189a-223a; JA127-33, 247-51.

The district court asserted repeatedly that a number of the terms in the regulatory materials and the company documents were susceptible of differing interpretations. *See, e.g.*, Pet. App. 120a (penalties under self-discipline), 124a (suspension provision), 126a-27a (applicability of PVC to output restrictions),

128a (requirement to specify prices and quantities to receive a chop). But rather than rely on the sources who would know, *i.e.*, the Ministry (or the experts or the commentators), to address these perceived ambiguities, and rather than interpret the regulatory system as one that was workable and made sense, the court simply reached outcomes in every instance favorable to the Petitioners and adverse to China and the Respondents.

By bypassing the Ministry, the district court found itself making up its own interpretation of critical Chinese terms that have no counterpart in American law. One key example is "industry self-discipline." The court's determination that industry self-discipline reflected an absence of government compulsion was contrary to any plausible reading of the plain language of the regulatory provisions, and to the unanimous views of the Ministry, the expert testimony, and independent commentators that self-discipline is a government mandate for industry members to go out and reach "voluntary" agreements on prices and volumes. *Compare* Pet. App. 79a-80a *with* pp. 6-7 above.

The district court's stated reason for rejecting nearly everything the Ministry had to say was that the Ministry statements did not cite every regulation and did not anticipate the court's questions and criticisms. Pet. App. 119a-22a. But as the advisory committee note to Rule 44.1 provides, "[o]rdinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely." FED. R. CIV. P. 44.1 advisory committee note; *see*

Charles E. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1296 (1952). The district court expressly declined to follow that procedure here, giving neither Respondents nor the Ministry the opportunity to address the court's concerns. Pet. App. 97a & n.24. It did not even hold oral argument on summary judgment.

Notwithstanding its rejection of the Ministry, the district court cited no provision of Chinese law supporting its manner of construing the regulations in issue. Its ruling even defied basic U.S. canons of construction – that regulations should not be interpreted in a manner that defies the plain meaning of the terms, that makes no sense, that would defeat the purpose of the regulations, or that fails to give effect to all of the regulations' terms. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous."); *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009) ("[S]tatutes [should] be construed in a manner that gives effect to all of their provisions.").

The district court's analysis has nothing to commend it, and this Court should reject it.

IV. REGARDLESS OF THE LEVEL OF DEFERENCE, THE JUDGMENT SHOULD BE AFFIRMED

1. In the end, the level of deference should make no difference. The Second Circuit's standard is not one of conclusive deference in all circumstances, and its standard is entirely proper. But even if the standard were one of no deference, as if the Ministry had not even appeared, there is only one appropriate

outcome: dismissal of the complaints on the basis of international comity.[24]

A judgment of affirmance is therefore in order even if the Second Circuit's standard is modified in some way. This question of the proper disposition here has been argued by Petitioners (Pet. Br. 57-59) and by a few of Petitioners' *amici* (*e.g.*, AAI Br. 12-16). Addressing that question is consistent with the Court's opinions in a number of related contexts, where it disagreed with the standard applied below but affirmed after applying the correct standard. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765-68 (1984); *Kiobel*, 569 U.S. at 108; *Knight v. Comm'r of Internal Revenue*, 552 U.S. 181 (2008); *United States v. Tinklenberg*, 563 U.S. 647 (2011).

2. In considering whether to dismiss on the basis of international comity, the sole issue presented to the court of appeals was whether Chinese law was in conflict with the Sherman Act. *Cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993). The court found that the other factors "decidedly weigh in favor of dismissal," Pet. App. 34a, and Petitioners never contested the point. Annex B.

Petitioners and AAI advance three arguments as to why the conduct in issue here was not compelled and, therefore, that there was no conflict between Chinese and U.S. law. None has merit.

i. The first argument is that, because participation in the subcommittee was "voluntary" and could be terminated, there could be no compulsion.

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[24] Comity is the only one of Respondents' defenses before this Court. The court of appeals had no need to reach any of the other issues raised by Respondents on appeal. Pet. App. 37a-38a.

Pet. Br. 8-12; AAI Br. 11-15. There is nothing, however, to indicate that participation by the four leading manufacturers – as distinguished from the newly-added members – was voluntary in any meaningful sense. The four were all Council members appointed for four year terms with no provision for termination, and the only evidence in the record was that they could not withdraw as a practical matter. *See* pp. 9-10 above.

Even so, the idea that everyone could refuse to join, resign, or decline to reach agreements in the first instance fails as well. That argument would render the entire regulatory regime a nullity. The plain language of the regulations required submission of "industry-wide negotiated prices," JA99, a requirement that would make no sense absent the requirement to arrive at an industry-wide negotiated price. Pet. App. 28a. And non-members were bound to the industry-wide negotiated prices even if they did not participate. JA105-06.

The ability to withdraw makes no difference in any event. Just as the ability to withdraw is no defense in an action for price-fixing, *e.g.*, *United States v. Salmonese*, 352 F.3d 608, 615 (2d Cir. 2003); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1271 (6th Cir. 1995), that ability cannot negate the fact that China required a violation of the Sherman Act. And, to repeat, withdrawing members were still bound by the Chamber's coordinated prices anyway. JA106.

Petitioners effectively concede that the 1997 regulatory regime compelled the companies to fix prices and limit output. *See, e.g.*, Pet. Br. 5-6, 8. But they identify nothing in the 2002-03 notices, announcements, charters, or anything else that changed the obligation to coordinate price and output, under

the Chamber's supervision, in furtherance of industrial self-discipline. Those obligations – and thus the compelled violation of the Sherman Act – continued in full force. JA53-55, 99-100, 105-06, 183.

ii. Petitioners and AAI assert that Respondents exceeded the "scope" of governmental compulsion by agreeing on prices higher than antidumping minima, and by agreeing on output limitations, not just price. Pet. Br. 58 n.19; AAI Br. 12-13.

As to the scope of the compulsion, the governmental directive was for the companies to reach agreements on prices voluntarily, without having the government set a particular price. *See* pp. 7-11 above. The obligation was to agree on prices by themselves, *see* JA55, not to charge some dictated price. Respondents acted entirely within the scope of that compulsion, and that was what was in conflict with the Sherman Act. It has long been bedrock that "conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), that "[a]ny combination which tampers with price structures is engaged in an unlawful activity," *id.* at 221, and that the price level established does not matter, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); *see Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) ("agreed starting point" for price negotiations sufficient to establish violation). Petitioners and AAI ignore these principles.

The output argument, Pet. Br. 11-12, fails as well. Coordination on output was required under the 2002 PVC regime. The companies were obligated to specify to the Chamber "the prices and quantities" and the Chamber was required to "verify the submis-

sions by the exporters based on the industry agreements." JA105; *see* JA59; CAJA2216-17. Moreover, as this Court has often explained, price and output are economically (and legally) the same. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 777 (1999) ("An agreement on output also equates to a price-fixing agreement.") (quoting *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984)); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993) ("Supracompetitive pricing entails a restriction in output."). Compelling price-fixing is compelling agreements on output. Although the Chinese regulations spoke primarily about price, their scope encompassed output (as they would have to), and the Chamber supervised production quantities throughout the relevant period. *See* JA180, 242, 367, 435. Requiring companies to fix prices without regard to output would have made no sense.

iii. Petitioners also note the difficulties the Chamber sometimes had in enforcing the agreements, and the occasional cheating. Pet. Br. 10-11.

Less-than-complete enforcement and cheating have nothing to do with whether Chinese law required the price-fixing Petitioners challenge. *Socony* confirmed that the violation is the agreement, not its success, and the courts have consistently held that cheating is not a defense to a price-fixing charge. *See United States v. Andreas*, 216 F.3d 645, 679 (7th Cir. 2000) ("[C]artel members cheated each other when they could[.]"); *Hayter*, 51 F.3d at 1274-75; *accord* Pet. App. 32a ("[I]nquiring into whether the Chinese Government actually enforced the PVC regime as applied to vitamin C exports confuses the question of what Chinese law required with whether the vitamin

C regulations were enforced."). Just as cheating cannot negate the existence of an agreement to fix prices, it equally cannot change what Chinese law required.

The Chamber did its best to enforce the requirement to coordinate price and output. JA434-36. It is not surprising, however, that enforcement proved to be difficult. China was moving from a command economy to one in which more private ownership was permitted, and companies were experiencing competition under regulation for the first time. "Cheating" on price-fixing arrangements is prevalent and often economically rational even in the most mature economies. *See* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 405b (4th ed. 2014). That it was observed in China's nascent "socialist market economy" is neither surprising nor a basis for denying the compulsory nature of China's regulatory regime.

3. The internal company documents cited by Petitioners do not change the outcome. Complaints about company noncompliance with output reductions, statements occurring in unrelated contexts such as "only honest fellows will follow," Pet. Br. 12-14,[25] and the suggestion that defendants need to act "in a more hidden way" following the initiation of this lawsuit, *id.* 16, have nothing to do with what Chinese law in fact required. Disputes about rival compliance

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[25] The relevant passage describes general complaints about "illegal or sub-standard drug producers" whose products raised safety concerns. It is not about price coordination and is not specific to Vitamin C. JA454, 603. It was about getting the Chamber greater authority to "punish companies who engage in smuggling, tax evasion or who have little credibility" and to "honor those who are trustworthy" to improve the "credibility" of Chinese pharmaceutical products. JA455.

with price-fixing agreements, and the nervous reactions of Chinese nationals sued for vast sums under unfamiliar laws in a country 6800 miles away are not surprising. Much less do they suggest that price-fixing was not required under Chinese law.

4. In this Court, in addressing comity abstention, the government criticizes the court of appeals for giving "inadequate weight to the interests of the U.S. victims . . . and to the interests of the United States in enforcement of its laws." U.S. Br. 32 n.8. As Petitioners raised no such arguments below, it seems unfair to criticize the Second Circuit for not addressing them. But even if the points had been raised, they would not properly have affected the outcome.

Plaintiffs' interests in collecting money and the U.S. national interest in enforcing the antitrust laws are present in every private antitrust case. There is nothing unique about those interests here. In contrast, the other relevant considerations are unique: defendants were all Chinese companies; all the activity took place in China under China's regulatory regime; China has repeatedly explained the importance of this case, and has protested the district court's disposition through official diplomatic channels. The considerations favoring dismissal, therefore, are at their zenith. To argue that they are overcome by the typical interests at issue in every case, whether domestic or international, is to argue comity dismissals are never appropriate. This Court has never said any such thing, and specifically declined certiorari to address that argument when agreeing to hear this case. *See* Pet. i; *cf. Hartford Fire*, 509 U.S. at 812-22 (Scalia, J., dissenting in relevant part, joined by O'Connor,

Kennedy, and Thomas, JJ.) (endorsing principle of comity abstention which majority declined to reach).

As the case now stands, the only issue on comity abstention is whether Chinese law conflicted with the Sherman Act. *See id.* at 798 (whether there is a "true conflict" is the "only substantial question in this litigation"). The court of appeals correctly concluded that it did. *See* Michael N. Sohn & Jesse Solomon, *Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict*, 28 ANTITRUST 78 (Fall 2013).

5. As the court of appeals recognized, Petitioners' arguments amount to an attack on China's choice of regulatory system and the manner in which it was implemented and enforced. Pet. App. 31a-32a. The requirement to fix prices was stated unambiguously in the regulatory documents, as was the structure of the PVC enforcement mechanism. By questioning the level of enforcement by Chinese officials, and demanding that they do more than they did, Petitioners impermissibly seek to invalidate "the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 406 (1990). Courts of the United States do not tell foreign nations how to enforce their own laws, *Underhill*, 168 U.S. at 252-54, and a private class action case is not a proper vehicle for invalidating China's method of regulating the export of Vitamin C.

As Circuit Judge Ginsburg and John Taladay put it recently, if antitrust enforcers

> do not apply comity in the application of their laws and in limiting the extraterritorial scope of their remedies, then international competition enforcement will quickly devolve into a

> "race to the bottom," in which the country with the most restrictive competition laws will regulate commercial conduct for the entire world. The effects doctrine is a legitimate basis upon which to apply competition laws and impose remedies but, just as an agency considers how foreign conduct affects its domestic consumers, it likewise should ensure that its remedy does not unnecessarily affect foreign governments, agencies, business interests, or consumers. Comity should be invoked to prevent the effects doctrine from becoming a way for one jurisdiction to impose its domestic commercial policy on the conduct of businesses outside its borders. Otherwise competition enforcement turns from a policy to protect consumers into a slightly disguised way of implementing industrial policy.

Douglas H. Ginsburg & John M. Taladay, *Comity's Enduring Vitality in a Globalized World*, 24 GEO. MASON L. REV. 1029, 1048-49 (2018) (forthcoming).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

ANNEX A

Excerpt from Br. for Plaintiffs-Appellees at 25-26:

Appellants repeatedly assert that Chinese law mandated the challenged conduct in this case, but Chinese law only required the Chamber and its Subcommittee to "actively coordinate to set vitamin C export prices and quantities." Br.12. The Ministry has made no argument about the specific agreements proven at trial. Instead, the Ministry has represented that Subcommittee members were required to engage in a pre-designated process if called upon by the Chamber, but not to reach any particular result. A-205-07.

ANNEX B

Point II.E of Br. for Plaintiffs-Appellees at 45-46:

E. Dismissal Is Not Required as a Matter of Comity.

To trigger the discretionary comity doctrine, a "true conflict" must exist between U.S. and foreign law such that compliance with the laws of both countries is impossible. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). Consistent with *Hartford Fire*, foreign law did not require Appellants "to act in some fashion prohibited by the law of the United States." *Id.* at 799. Appellants argue that a "true conflict" is not required to trigger the comity doctrine under *Hartford Fire*, but cite only two post-*Harford Fire* cases, neither of which supports their argument. *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (true conflict existed); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996) (no true conflict existed).

Here, compliance with both the Sherman Act and Chinese law was not only possible, it happened: Chinese vitamin C manufacturers did not engage in price fixing prior to the end of 2001; they engaged in price wars until the cartel was formed. A-2005-34; A-176 ("Between May 2000 and late December 2001, vitamin C in [China] experienced the second 'price war' since 1995"). The companies and the Chamber also stopped meeting after 2008. A-1827, lines 2-9.

Appellants wrongly claim the district court held that *Hartford Fire* overruled *O.N.E. Shipping*, *Hunt*, *Timberlane*, and *Mannington Mills*. Br.40-41. All the district court did was note that whether a court must consider the *Timberlane* factors in a comity analysis

absent a true conflict is "unclear" after *Hartford Fire*. SPA-66. The court then expressly considered the *Timberlane* factors, and concluded that they do not support abstention unless the government of China actually compelled the alleged conduct. SPA-67-68.

No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

U.S. courts are not bound to defer to interpretations of foreign law offered by appearing foreign sovereigns. "Deference does not mean acquiescence," *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 508 (1992), and the District Court was not relieved of its obligation to decide the questions of foreign law before it because the Chinese Ministry of Commerce ("Ministry") filed an *amicus* brief.

The District Court followed a well-trodden path by applying a "substantial deference" standard. The United States endorsed the standard fifteen years ago, and it was the prevailing approach prior to the decision below. A substantial deference standard permits courts to consider the completeness, consistency, and authority of foreign legal statements, and it is consistent with principles of international comity and international practice. The rules favored by the Ministry and Respondents would require deference to interpretations of foreign law that U.S. courts find inconclusive, inaccurate, or even misleading. Courts can and will benefit from the expertise of foreign sovereigns under a substantial deference standard—there is no reason to resort to the artificial constraints of an ill-conceived rule.

The Ministry's warnings of diplomatic chaos ring hollow. No other government has endorsed the Ministry's position. Instead, the Executive Branch—which unlike this Court has authority and expertise in matters of foreign relations—has appeared in this Court supporting Petitioners notwithstanding China's protests.

The District Court appropriately applied a "substantial deference" standard that permitted it to consider the thoroughness, consistency, and accuracy of the Ministry's brief. The Ministry does not dispute that its presentation of Chinese law was incomplete and inaccurate—it repeatedly cited provisions of a repealed version of the Vitamin-C Subcommittee Charter as though they remained in force, declined to interpret relevant provisions of the regulatory scheme, and offered the District Court no explanation of its conflicting statements to the World Trade Organization ("WTO").

The District Court's interpretation of Chinese law was not "nonsensical"—and it was far more thorough than the cursory examination on which the Second Circuit relied. Following its accession to the WTO, China sought to avoid anti-dumping penalties. In that context, the requirement that the Chamber "verify the submissions by the exporters based on the industry agreements," JA105, made perfect sense alongside price agreements that were encouraged but not mandated. Such a system permitted profitable exports to continue when agreements could not be reached, but offered a mechanism for enforcing anti-dumping minima when agreements were achievable. Far from being a theoretical construct invented by the District Court, the record showed this to be the actual system in place during the class period, and the agreements for which Respondents were held liable were not required by it. Pet. Br. 10-11.

ARGUMENT

I. The Second Circuit's Binding Deference Standard Should Be Reversed.

A. There is No Legal Support for a Binding Deference Standard.

1. Petitioners have previously explained why the Second Circuit's rule amounts to conclusive deference. Supp. Br. for Pet. 3-7. Respondents do not defend the merits of a conclusive deference standard, but instead endorse a "modest holding" that directs courts to "defer if reasonable." Resp. Br. 20, 22. That is not what the panel held.

a. In the sentence immediately following the phrase "reasonable under the circumstances presented," the panel explained that "[i]f deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations. . . ." Pet. App. 25a-26a. The Ministry attempts to limit the court's "do not challenge" command to inquiries based upon U.S. legal principles, but the panel's interpretation was more expansive. Under the panel's test, a court may not question a sovereign's representations by comparing them to information submitted by a non-sovereign party, prior conflicting sovereign statements, or information discovered by the court's own research. Rather, the only exception is where "no documentary evidence or reference of law [is] proffered" to support the interpretation. Pet. App. 25a n.8. That approach would limit Rule 44.1 inquiries to evaluating the reasonableness of the representation on its face.

b. The rigidity of the Second Circuit's rule is evident from its reversal of the District Court's denial of Respondents' motion to dismiss. Pet. App. 2a n.2. The District Court's only holding at that time was that "the record as it stands is simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." Pet. App. 186a. To hold that the District Court abused its discretion by permitting discovery must mean that the court lacked authority to consider materials beyond the Ministry's brief.

The Ministry now claims that conclusive deference does not limit a court's discretion to consider extrinsic materials, Ministry Br. 25, but said the opposite below. The Ministry argued that its *amicus* brief required the District Court "to ignore" Petitioners' expert testimony, CAJA A622, and further urged that, "unless the Court makes an affirmative finding that it finds [the Ministry's] presentation inherently non-believable, the only proper disposition is to credit the government's finding *and to foreclose an inquiry into what the law says and other findings*," *id.* (emphasis added). The panel ultimately adopted that view.

c. Even with Respondents' gloss, the panel's standard would still require deference to legal interpretations that are unpersuasive, yet nonetheless "reasonable under the circumstances." Pet. App. 25a. Such a test is indistinguishable from the standard applied under *Chevron*. But the Ministry's brief would not pass muster under a *Chevron*-like rule, Pet. Br. 48-55, and there is no basis for substituting such a rule for the discretion Rule 44.1 contemplates.

Respondents and the Ministry misapprehend the import of this Court's cases involving deference to administrative agencies. Pet. Br. 47-57. This Court has countenanced standards of binding deference based upon an implied congressional delegation of rulemaking authority to an agency. Even in that context there are substantial limits to deference that the Second Circuit's rule ignores, *id.* at 48-55, and outside that context, deference is not required even when an interpretation appears reasonable, *id.* at 54. Similarly, the Ministry offers no persuasive justification for insisting that a foreign trade ministry receive more respect than the highest ranking law-enforcement official of a U.S. state. *Id.* at 56-57.

2. There is no place for a conclusive deference standard under Rule 44.1. Pet. Br. 31-38. While the rule permits courts to "consider any relevant material or source" in interpreting foreign law, the Second Circuit held that courts may not rely upon materials beyond the four corners of the sovereign's statement. In holding that the District Court committed legal error by permitting discovery to proceed, the panel held that *all* of the materials developed during discovery and trial were unworthy of consideration. Pet. App. 2a n.2, 30a. A court's discretion to "decide what weight is to be given to information obtained from any of these sources," *Fremont v. United States*, 58 U.S. (17 How.) 542, 557 (1855), is pointless if relying upon such sources constitutes reversible error.

Contrary to the Ministry's claim, Ministry Br. 11, this Court's decision in *Fremont* did not grant conclusive weight to any legal interpretation offered

by the Mexican government. Instead, the interpretation of Mexican law on which this Court relied was rendered in 1844, a decade before *Fremont* was decided. *Fremont*, 58 U.S. (17 How.) at 561. And the interpretation that this Court accepted was a pre-litigation decision by Mexican authorities not to enforce procedures that Mexican laws purported to require—in other words, this Court held that Mexico's laws as written should be read in light of how Mexican officials had implemented them in practice. *Id.* at 561-62. Under *Fremont*, the Second Circuit erred in holding that the District Court should not have considered pre-litigation evidence relating to enforcement, including the Chamber's practice of permitting exports that did not comply with the Ministry's interpretation of the regulatory scheme. Pet. App. 32a.

The Ministry's consecutive "[n]ever before" declarations, Ministry Br. 23, misunderstand U.S. law. Since the enactment of Rule 44.1, federal courts have thought it highly "desirable"—and necessary—to review questions of foreign law *de novo*, even where foreign sovereign legal interpretations are involved. *E.g. Riggs Nat'l Corp. & Subsidiaries v. Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) ("We are . . . hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised.").

3. Requiring conclusive deference would sacrifice the accuracy of foreign law determinations by privileging the identity of the interpreter above the content of the interpretation. Pet. Br. 31-39. Reliance

on a foreign sovereign's legal statement may enhance accuracy in some cases, but that is not a reason to require conclusive deference in all cases. There is also no justification for a rule that would grant conclusive deference to an *amicus* brief submitted by a foreign sovereign's U.S. counsel, but not to a duly-enacted regulation of a foreign agency, an interpretive letter of a foreign minister, a decision of a foreign court, or a sworn affidavit of a non-appearing foreign official. Pet. App. 30a n.10.[1]

The Ministry argues that foreign governments "have strong incentives" to explain their laws accurately in U.S. courts, Ministry Br. 18, but those incentives failed to keep the Ministry honest here, *infra* at 15-19, and the incentive to protect domestic industry is also powerful. Further, the consequences of inaccuracy are different when the interpretation concerns repealed laws. Unlike the "existing" Russian law interpreted by the Commissariat in *United States v. Pink*, 315 U.S. 203, 220 (1942), the Ministry's interpretation described a legal regime

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[1] The Ministry appears to believe that conclusive deference applies only when sovereigns appear as *amici*. The Ministry argues that multiple briefs filed by the Islamic Republic of Iran in *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), did not receive conclusive deference because they did not offer an "official interpretation of Iranian law" (the Ministry ignores *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012)). Ministry Br. 14. But the Ministry's only interpretation of Chinese law at the motion-to-dismiss stage was its *amicus* brief signed by U.S. counsel, and that brief was no more "official" than the briefs Iran filed as a party in *McKesson*.

that Respondents abandoned after Petitioners filed suit, Pet. Br 13.

4. The Ministry zigzags between defending a "clear" rule of conclusive deference, Ministry Br. 22-23, and a standard that permits courts to "consider any relevant material" and defer only if "reasonable under the circumstances," *id.* at 24. But the only way the Ministry's rule could be "clear" is by inappropriately limiting the discretion contemplated by Rule 44.1. Pet. Br. 27-39. A standard that applies only to "reasonable" interpretations, Ministry Br. 4, would be hopelessly indeterminate absent guidance on what is reasonable, including what (if any) extrinsic materials a court may consider when those materials contradict a sovereign's *amicus* brief. In any event, Respondents and the Ministry cannot credibly oppose "open-ended balancing tests"—the comity defense they would have this Court affirm is a meandering ten-factor test that offers no guidance on the respective weight to be accorded to those factors. *See* Pet. App. 220a-222a.

B. *United States v. Pink* Does Not Support the Second Circuit's Deference Standard.

1. Respondents misleadingly assert that "[t]his Court has never deviated from the clear rule of deference established in *Pink* more than 75 years ago," Resp. Br. 25. *Pink* did not establish a prospective rule of deference, let alone a "clear rule of deference" that controls this case. Pet. Br. 40-41. The deference owed to an "official declaration" of a foreign sovereign was *not* a question presented in *Pink*, and this Court did not analyze it. 315 U.S. 203, 219 (1942). Nor did this Court hold that legal

arguments offered by a foreign ministry's *amicus* brief, absent endorsement of the Executive Branch as this Court credited in *Pink*, ought to always or even generally receive conclusive deference.

Contrary to the Ministry's claim, Ministry Br. 9, *Pink* did not hold that it would be inappropriate to consider "the evidence in the voluminous record" of the New York courts' *Moscow Fire* cases because of the Commissariat's declaration, *Pink*, 315 U.S. at 218. This Court did not explain why it declined to review the "voluminous" record before the referee, "except to note that the expert testimony tendered by the United States gave great credence to its position," *id.*, and there is no reason to presume that this Court would have reached the same result had the United States taken a contrary position.

2. *Pink* illustrates the infirmity of a conclusive deference rule. Pet. Br. 42-43. The Commissariat's "power to interpret existing Russian law" was essential to this Court's finding that its declaration was "conclusive." *Pink*, 315 U.S. at 219. Respondents concede that who has the power to interpret foreign law is a question of foreign law, yet do not explain how courts should decide that question. Ordinarily, such a question "must be decided by a court, without deference to the agency." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Yet under the panel's rule, a court would have to defer when an appearing sovereign representative asserts its power to interpret foreign law. That approach could force U.S. courts to side with one arm of a foreign sovereign over another by happenstance of which arm of the sovereign appears in U.S. court first. *Cf.* Brief for the Republic of

Honduras as *Amicus Curiae* in Support of Petitioner, *McNab v. United States*, No. 03-622 (Dec. 29, 2003) ("The 'original government position' . . . consists of statements made by mid-level government bureaucrats who were unauthorized to offer legal opinions on behalf of Honduras.").

3. The Ministry never informed the District Court of its "unquestioned" authority to interpret Chinese law. Pet. Br. 42-43. Rather than explaining its failures, the Ministry resorts to the misrepresentation that Petitioners "never" raised the issue. Ministry Br. 10, 32. Petitioners raised this precise argument in response to Respondents' motion to dismiss: "Defendants have offered no evidence to show that the Ministry of Commerce has *any* power under Chinese law to interpret Chinese law, or, if it has such power, that it may do so through a litigation brief." Plaintiffs' Mem. in Opposition to Mot. to Dismiss, *In re Vitamin C. Antitrust Litig.*, No. 06-md-1738, (E.D.N.Y. Aug. 16, 2006), ECF No. 46, at 32. The Ministry offered no response until Respondents appealed—and even then did not claim that its authority was confirmed by China's diplomatic note.[2] Petitioners agree that this Court should not "entertain arguments not made below," Ministry Br. 10, but it is the Ministry's claim to law-interpreting authority that this Court should ignore.

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[2] Contrary to Respondents' suggestion, Resp. Br. 3 n.1, the diplomatic note does not assert that Chinese law delegates law-interpreting authority to the Ministry. JA783.

C. Comity Does Not Support a Binding Deference Standard.

While principles of international comity counsel "respect for the knowledge that foreign sovereigns have about their own law," Resp. Br. 28, they do not require binding deference.

1. Neither Respondents nor the Ministry dispute that the Second Circuit's approach is an international outlier—most of the world has rejected binding deference. Br. of Professors of Conflict of Laws and Civil Procedure at 19-25. Nor do Respondents dispute that the leading international treaties are at odds with the panel's rule. The notion that a theoretical foreign nation *could* adopt a more rigorous rule, Resp. Br. 30, is farfetched—no nation has done so. And the Ministry has not represented that Chinese courts would grant conclusive deference to the Justice Department's interpretations of U.S. law.

2. Respondents and the Ministry are correct that this Court should avoid "interference with the international relations prerogatives of the political branches," Resp. Br. 33, but their prescription would replace the traditional judicial role with diplomacy by fiat. The Executive Branch has communicated its prerogatives regarding this case, and notwithstanding China's vociferous objections, the United States has urged this Court to vacate the decision below and hold that binding deference is inappropriate. U.S. Br. 30-32.

The Ministry appears to view "respect" as a one-way street: it repeatedly attacks the District Court for disrespecting Chinese sovereignty, Ministry Br. 2,

5, 22, while in the same breath lecturing the U.S. Executive and Judicial Branches on how to interpret and apply U.S. law, *id.* 3-6, 8-9, 20, 22-23. In any event, courts should not decide cases based upon the perceived degree of offense taken by a foreign nation. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts.").

3. Respondents incorrectly assert that the "extraterritorial application of U.S. antitrust laws" warrants more robust deference than might otherwise apply. Resp. Br. 34, 57-58. Congress determines whether federal statutes apply extraterritorially, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016), and Congress can weigh the interests of foreign governments in deciding whether to apply U.S. laws to foreign conduct, as it has already done in cases where, as here, foreign conduct has caused domestic injuries, *see F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004). This case was limited to direct sales into the United States that harmed U.S. victims via inflated prices, and conclusive deference to foreign sovereign submissions is unnecessary to avoid the imprecise application of U.S. law in such circumstances.

Further, the comity doctrine includes numerous factors beyond the "true conflict" test that directly account for foreign sovereign interests. *See Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1977). Under the Ministry's conclusive deference rule, these additional factors would serve almost no purpose, and the "true

conflict" test would become a reflection of the foreign sovereign's policy interests rather than an accurate assessment of whether two legal regimes conflict.

II. The District Court Applied an Appropriate Deference Standard.

A. The District Court Granted "Substantial Deference" to the Ministry's Legal Submissions.

1. The District Court's motion-to-dismiss opinion appropriately held that the Ministry's brief was "entitled to substantial deference, but will not be taken as conclusive evidence of compulsion" because "the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." Pet. App. 181a.

At summary judgment, the District Court reaffirmed this "substantial deference" standard and again rejected Respondents' argument that the Ministry's brief was entitled to "conclusive" deference. Pet. App. 95a-97a. The court plainly did not apply a "no" or "negative" deference standard—the court deferred to certain of the Ministry's representations. Pet. App. 118a-119a n37.

2. The parties agree that the Chinese authorities on which the Ministry chiefly relies contain ambiguous provisions, *e.g.* JA98-106, but dispute

how to resolve those ambiguities.[3] Respondents argue that these ambiguities compel deference to the Ministry's brief, but the District Court held that other sources also warranted attention. Specifically, the court weighed the pre-litigation statements and conduct of Respondents and Chinese government officials, which revealed how the participants in China's regulatory scheme understood the system during the relevant period. In doing so, the court did not "embark[] on a solo mission," Ministry Br. 16, or substitute its judgment for "those in the best position to provide direction," Resp. Br. 47, but instead credited the *contemporaneous* statements and actions of the same people and entities it is now accused of disrespecting.

Respondents' claim that the District Court relied on its "own view" of the "post-translation 'plain language'" of the Ministry's regulations, Resp. Br. 38, misses the mark. The Ministry's brief parsed much of the same language that the District Court examined, Pet. App. 202a-209a, and the District Court's reading of the regulatory texts was confirmed by its examination of contemporaneous statements by

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[3] Respondents again claim that Petitioners "concede[d]" that price fixing was "mandatory" under the 2002 regime. Resp. Br. 13 & n.8. That is still false. Cert. Reply Br. 10 n.1. Petitioners' statement referred to a heading in *Respondents'* brief, and the surrounding paragraphs and pages make clear that Petitioners continued to argue that price-fixing was not mandatory, and that even Respondents' position about Chinese law would not absolve them of liability. *See generally* Br. of Plaintiffs-Appellees, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Aug. 11, 2014), ECF No. 174.

Respondents and the Chamber. Further, the Ministry offered official translations of "notarized" Chinese regulations, and represented that they had been "certified" by a "qualified translation agency." Pet. App. 198a-200a & n.10. At minimum, the District Court was justified in relying on translations that the Ministry represented as authoritative in a sworn declaration by its U.S. counsel. *See, e.g., id.*; Declaration of Joel M. Mitnick, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y. June 29, 2006), ECF No. 70.

3. The application of "substantial deference" is fully consistent with considering the completeness of a foreign sovereign's submission, the consistency of that submission with underlying legal texts or prior public statements by the sovereign, or other sources that bear upon how the sovereign understood and implemented the law in question. U.S. Br. 21. This Court endorsed such an approach more than a century ago in *Fremont*, and the District Court properly followed it here.

B. The Ministry's Brief Was Unworthy of Conclusive Weight.

1. Applying a standard of substantial deference, the District Court appropriately declined to grant conclusive weight to the Ministry's motion-to-dismiss phase *amicus* brief because it presented an incomplete and misleading summary of Chinese law. The Ministry claimed to "inform the Court of the regulatory scheme that governed defendants during the period encompassed by the Complaint," Pet. App. 191a, but its brief failed in that task. The District Court's decision to permit further discovery was not

"profoundly disrespectful," Ministry Br. 2, but appropriate given the record before it.

2. The Ministry's *amicus* brief failed to explain important provisions of the vitamin-C regime. For example, the brief relied extensively on the Ministry's 2002 PVC Notice, but did not acknowledge the existence of that Notice's suspension provision. Pet. Br. 15. The Ministry now claims that Respondents could not invoke this provision on their own, but that is irrelevant. The question was whether compliance with both legal regimes was *impossible*, and the District Court reasonably observed—in the absence of *any* interpretation of the provision by the Ministry—that Chinese law provided a mechanism that could have been invoked to comply with U.S. law. Pet. App. 97a, 124a. Respondents now say that this provision "was not continued in the 2003 Announcement," Resp. Br. 8, but there is no indication that the 2003 Announcement was meant to replace the 2002 Notice, and the Ministry has never interpreted it in that way. Finally, Respondents observe that the suspension provision was never invoked, Resp. Br. 8, but that conflicts with their position that under a "true conflict" test it is the face of China's regulations, not how those regulations were implemented, that matters, Resp. Br. 22, 54-56.

3. The Ministry's *amicus* brief affirmatively misrepresented that the 1997 Vitamin C Subcommittee Charter was operative "[t]hroughout the relevant period," Pet. App. 202a, and repeatedly cited provisions of the 1997 Charter to support its compulsion theory without disclosing that those provisions were obsolete for most of the class period,

see Pet. App. 204a-205a, 212a-213a.[4] Not one of the Ministry's three submissions to the District Court mentioned that the 2002 Charter repealed and replaced the 1997 Charter. Pet. App. 132a & n.45; Pet. App. 189a-223a; JA131-33; JA247-51.[5]

The Ministry has never explained why it did not inform the District Court about the 2002 Charter. In this Court, the Ministry argues that it distinguished between the 1997 and 2002 regulatory regimes, Ministry Br. 28, which is true but non-responsive—the 2002 Charter was a pillar of the 2002 regime, but the Ministry pretended it did not exist. In this Court, the Ministry downplays the significance of the changes between the two Charters, Ministry Br. 27-28, but the District Court cannot be held responsible for explanations the Ministry did not offer. Pet. App. 97a.

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[4] Respondents parroted these claims at the motion-to-dismiss hearing. CAJA A606 (arguing that the 1997 Charter "is the charter of this subcommittee," and "only the members of the subcommittee have the right to export Vitamin C").

[5] The District Court was not obliged to give notice that it intended to rely on the 2002 Charter, or the other regulatory provisions that contradicted the Ministry's legal interpretation. Resp. Br. 49-50. All of the regulatory materials before the District Court were submitted by the Ministry or the parties, including the 2002 Charter, and the Ministry had "more than ample opportunity to explain . . . Chinese law" when it chose in 2009 "not to discuss, or cite to, any specific governmental directives." Pet. App. 97a n.24.

The Subcommittee's mandate changed radically in 2002, and the Ministry's contrary claims defy credulity. The regulations diverge in several respects: first, the 2002 Charter departed from its predecessor by describing the Subcommittee as "a self-disciplinary industry organization jointly established on a voluntary basis," JA182; second, unlike in 1997, the 2002 Charter did not require exporters to be members of the Subcommittee and contained provisions by which members could initiate resignations[6], JA83-84, 186-187; and third, the 2002 Charter omitted each and every provision in the 1997 Charter that purported to require Chamber members to engage in price-setting activities, *compare* JA85, *with* JA182-199. *See infra* 1a-3a.

In response, the Ministry cites a December 2001 resolution, Ministry Br. 28-29, but has never explained how that resolution interacted with the 2002 Charter provisions that abandoned the 1997 Charter's price-setting provisions. Separately, Respondents claim that a 2003 Announcement trumped contrary provisions in the 2002 Charter,

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[6] Respondents now claim for the first time that the right to resign under the 2002 Charter could not be invoked because members were selected to four-year terms. Resp. Br. 10. That argument was not made below, and it is at odds with Article Eighteen of the Charter. JA187. Respondents also claim that it would not have been "practical" for any member to resign, Resp. Br. 10, but the pre-trial affidavit Respondents cite does not address the Charter's specific resignation provision, and in any event what the affiant believed was "practical" does not define what Chinese law required.

Resp. Br. 8-9, but the Ministry did not offer that interpretation below so it could not have been a basis for deference. In any event, the 2002 Charter was in effect for a year and a half of the class period before the 2003 Announcement took effect. *Compare* JA182, *with* JA102.

C. The District Court Appropriately Weighed China's Statements to the World Trade Organization.

1. There is no dispute that China represented to the WTO that it "gave up export administration of . . . vitamin C" as of January 1, 2002. JA319. The explanations of this statement that Respondents and the Ministry offer this Court were not before the District Court, and the Second Circuit did not rely upon them.

2. The Ministry did not explain China's WTO statements before the District Court—when asked at the motion-to-dismiss hearing, the Ministry's counsel offered no response. CAJA A599-A630. Through summary judgment, the Ministry had "ma[de] no attempt to explain" its WTO statements in any submission. Pet. App. 121a. Without any explanation from the Ministry, the District Court observed that the date on which China said it had given up "export administration of vitamin C"—January 1, 2002—"coincides with the repeal, on January 1, 2002, of" the 1997 vitamin C export regime that governed Respondents' pre-2002 conduct, Pet. App. 123a, and appropriately concluded that China's prior statements raised doubts about the accuracy of the Ministry's *amicus* brief.

3. Respondents now assert, without explanation, that the PVC system only ended "non-automatic licensing" for Chinese vitamin C exports. Resp. Br. 11-12, 40-41. But China represented that it had abandoned "restrictions on exports through non-automatic licensing *or other means*," Pet. App. 74a (emphasis added), and it remains unclear why the PVC regime was not an export restriction through "other means." The Ministry does not explain how PVC was different from a regime of non-automatic licensing, or why China never published the vitamin-C PVC procedures in an "official journal" if they were intended to operate as an export restriction under the WTO. *See* Br. of Donald Clarke and Nicholas Howson as *Amici Curiae* in Support of Petitioners 11-17.

4. Separately, Respondents and the Ministry highlight the United States' submissions in the WTO's raw materials proceedings, but that case involved a different record and legal standard. None of the extrinsic materials that the District Court analyzed were before the WTO panel. U.S. Br. 31 n. 7. And the U.S. noted that its assumptions about China's export system had relied upon the Ministry's representations, in large part because that system was "non-transparent." First Written Submission of the United States, ¶¶ 205, 212, 215, 229.

Even if this Court were inclined to weigh the U.S. raw materials submission, China's refusal to make its WTO filings publicly available makes it impossible to know whether those filings were consistent with its *amicus* brief. There is reason to suspect otherwise. *See* JA728 (noting China's argument that the "*2001 CCCMC Charter* does not

contain either imperative or authoritative rules of conduct" under the WTO). Further, China's submissions to the U.S. Commerce Department prior to the raw materials case contradict the Ministry's claim that China still required "exporters to follow a price-setting regime." Ministry Br. 31. In 2004, the Ministry asserted—with limited exceptions not including vitamin C—that in China price and output decisions were based on market considerations, JA241; in 2007, the Ministry declared that "[t]here are no State restrictions on price or output." JA356.

III. The Judgment of the Court of Appeals Should Be Reversed.

1. This Court should reverse the Second Circuit's comity decision and remand for further proceedings consistent with its opinion as to Respondents' remaining defenses. At minimum, this Court should vacate the judgment and remand for further proceedings under the correct deference standard.

The District Court's failure to grant conclusive deference to the Ministry's brief was the sole dispositive factor requiring reversal. Pet. App. 30a n.10; Pet. Br. 59. If the District Court was not "legally bound" to accept the Ministry's brief, then the panel's decision rests entirely on its reading of the District Court's motion-to-dismiss stage construction of Chinese law, but that cursory review of the District Court's preliminary holding cannot withstand scrutiny.

2. Respondents and the Ministry argue that the Ministry's legal interpretation was so patently correct that it should have been affirmed under any standard of deference. Not so. The record reveals a

system designed to stabilize vitamin-C export prices and avoid anti-dumping suits, but does not support the claim that Respondents were required to reach agreements to charge supracompetitive prices and restrict output. Pet. App. 139a-142a.

a. The Ministry and Respondents repeat the panel's error by presuming that evidence relating to the 2001 decision to enact the PVC regime was solely about the motive of the Chinese Government. Pet. App. 30a-31a; Resp. Br. 54-55; Ministry Br. 26. That inquiry was aimed at the Ministry's conduct, not its motive. Pet. App. 185a-186a.

The PVC system did not exist in November 2001 when Respondents agreed to raise prices to $3/kg. Pet. Br. 7. The contemporaneous records of that meeting, alongside China's repeal of certain regulations and representations to the WTO, convinced the District Court that Respondents reached that agreement voluntarily. Pet. App. 123a. In light of that history, and Respondents' long-running price war, JA108, the District Court credited contemporaneous descriptions of the November 2001 meeting, including that "persons within the industry [concluded] that the enterprises were able to sit down together at this particular time basically because VC prices had reached rock bottom, and no one could sustain a further slide," and that enterprises "had no choice but to seek industry self-regulation" because "the country had opened up the commercial products business, from a free competition aspect," JA364. In other words, Respondents agreed to fix prices because of government *deregulation*, not compulsion. *Id.*

b. Respondents and the Ministry, citing the panel's one-paragraph discussion, Pet. App. 32a, dismiss nearly all of the evidence relating to class-period conduct as irrelevant evidence of "non-enforcement," Resp. Br. 54-55; Ministry Br. 26 n.8. That argument contradicts China's position in the WTO raw materials proceeding that "evidence showing that exports of yellow phosphorous occurred below the minimum export price demonstrates that China did not maintain a minimum export price requirement for yellow phosphorous." Second Written Submission of the United States ¶ 390. Further, evidence relating to so-called "non-enforcement" illustrated how the Ministry and Respondents understood and implemented the regulatory regime.

The District Court reviewed the regulations attached to the Ministry's brief, but found nothing that prohibited exports in the absence of industry price agreements. Pet. App. 132a. The Ministry has never explained what provision or concept of Chinese law Respondents violated when they exported without a price agreement. This gaping regulatory hole is not theoretical—for significant periods *before and during* the class, the Chamber openly permitted exports with no price agreement in place. *See* JA398-400 (Vitamin-C had no agreed-upon export price "for the spring of 2003"); JA397 ("Each company can provide price quote based on its own judgment, and no specific restraint or requirement is imposed."); Ex. 25 to Declaration of Annabelle Chan in Support of Defendants' Motion for Summary Judgment, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (E.D.N.Y. Nov. 23, 2009), ECF No. 394-5 at 41 (Respondents

"unanimously agreed to nullify the export restrictive price" because the price "at US$5.1/kg has no practical meaning").

3. Respondents and the Ministry repeat the panel's flawed reasoning that because the Sherman Act bars all price coordination, any coordination mandate would make compliance with the Act impossible. Resp. Br. 22; Ministry Br. 26; Pet. App. 32a. Antitrust abstention is only appropriate when "compliance with the laws of both countries is . . . impossible." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993). In cases involving minimum price floors, courts have rejected compulsion defenses where defendants have agreed to depart from the mandated floor. *E.g. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 315 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986). That rule is eminently sensible—without it, foreign governments could immunize companies from liability by mandating a coordinated price floor of $0.01 for every product.

Respondents admit that pricing was left "up to the companies so long as they exceeded anti-dumping minima." Resp. Br. 10. That admission is fatal, because the alleged anti-dumping floor was $3.35/kg throughout the class period, yet Respondents concede that they frequently agreed to fix prices above $3.35/kg. CAJA A2091-A2098. Respondents could have declined to fix prices above the $3.35/kg floor consistent with both the Sherman Act and Chinese law. Thus, it was improper to dismiss the District Court's findings of liability on agreements that exceeded anti-dumping minima.

Respondents do not dispute that for most of the class period, the Ministry and Chamber abandoned output restrictions, yet Respondents continued to agree upon output restraints separate from their price agreements. Pet. Br. 11-12. Price fixing and output restrictions both violate the Sherman Act—unless Chinese law compelled both, dismissal was improper.

4. Respondents claim that Petitioners never argued below that the remaining "comity abstention" factors counseled against dismissal. Resp. Br. 56-57. But Petitioners have consistently argued that comity-based abstention is appropriate *only* where a "true conflict" exists between U.S. and foreign law, and that without such a conflict, dismissal is improper. *E.g.* Resp. Br. Ann. A-2. As no conflict exists, the remaining "comity abstention" factors are irrelevant.

CONCLUSION

The Second Circuit's judgment should be reversed.

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APPENDIX

APPENDIX A

Comparison Chart: 1997 Charter vs. 2002 Charter

1997 Charter JA81-88 (appended to the Ministry's motion-to-dismiss stage *amicus* brief)	**2002 Charter** JA182-97 (omitted by the Ministry's motion-to-dismiss stage *amicus* brief)
Art. 2: The Vitamin C Subcommittee is "an industrial organization organized upon approval by the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and under leadership of the Chamber by those member enterprises" JA81	Art. 3: The Vitamin C Subcommittee "is a self-disciplinary industry organization jointly established on a voluntary basis" by members of the Chamber of Commerce engaging in vitamin C import and export business." JA182
Art. 6: "The Sub-committee will make proposals on the export development plan and annual export quota allocation, supervise the implementation export license by member enterprises and advises on allocation and adjustment of export quota, and issuance of export license." JA82	**Removed in 2002 Charter.**
Art. 7: "The Sub-Committee shall coordinate and administrate market, price, customer, and operation order of Vitamin C export."	**Removed in 2002 Charter.**

JA82	
Art. 10: "The Sub-Committee shall hold . . . working meetings for Vitamin C export to . . . analyze and work out coordinated prices for Vitamin C export, to supervise and inspect the implementation of such coordinated export prices set by the Sub-Committee . . ." JA83	**Removed in 2002 Charter.**
Art. 12: "Only the members of the Sub-Committee have the right to export Vitamin C and are simultaneously qualified to have Vitamin C export quota." JA83	**Removed in 2002 Charter.**
Not in 1997 Charter. JA84	Art. 16(8) (Rights of Members): "To freely resign from the Subcommittee" JA186
Art. 15(6) (Member's obligations): "Strictly execute export coordinated price set by the Chamber and keep it confidential." JA85	**Removed in 2002 Charter.** JA186
Art. 16 (Penalties): "The Sub-Committee will suggest to the competent governmental department, through the Chamber, to suspend and even cancel	Art. 19 (Penalties): "circulation of notice of criticism, issuance of warning, temporary suspension of membership, or cancellation of

the Vitamin C export right of such violating member." JA86	membership." JA187
Not in Relevant Article of 1997 Charter	Art. 19 (Penalties) "Punishment must be approved by the Council of the Subcommittee." JA187
Art. 18(5) (functions of members meeting): "to discuss and set export coordinated price." JA86	**Removed in 2002 Charter.** JA188
Art. 18 (6) (functions of members meeting): "to inspect Vitamin C export coordination and administration and the implementation of export coordinated prices, and to suggest on punishment measures on violating member." JA87	**Removed in 2002 Charter.** JA188
Art 19(6) (Functions of the Council): "Discussing and determining coordinated prices." JA87	**Removed in 2002 Charter.** JA189

No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief in response to the Brief of the United States as Amicus Curiae. Petitioners agree with the United States that this Court should grant review of the second question presented by the petition, and further agree that the Court can and should review that question regardless of whether certiorari is granted on the other questions presented.

I. Petitioners and the United States Agree that This Court Should Review the Circuit Split on the Appropriate Standard of Deference Owed to Foreign Sovereign Legal Statements.

1. Petitioners and the United States agree that this Court should review the second question presented. Br. of United States as Amicus Curiae ("U.S. Br.") 6-13. That question addresses the dispositive legal issue in the Second Circuit's decision, and it represents the core of the parties' dispute in this case.

The decision below rested *entirely* on the legal position articulated by the Chinese Ministry of Commerce ("Ministry") in its amicus brief filed in support of Respondents' motion to dismiss. Relying upon that position alone, the Second Circuit displaced a jury verdict and three separate decisions by two district judges holding that the Chinese Government had not required Respondents to engage in price fixing or output restrictions.

Each of the District Court's decisions afforded substantial deference to the Ministry's views, but reached a different conclusion about the meaning of Chinese law as applied to Respondents' conduct in light of the underlying source materials appended to the Ministry's own brief. Further, at each stage of the litigation—from the motion to dismiss through trial—the District Court relied upon evidence that contradicted the Ministry's position, including public pronouncements from the Chinese Government to the WTO explaining its deregulation of vitamin C prices, Pet. App. 73a-74a, direct statements from Respondents describing the voluntary association that they had joined and their voluntary agreements, Pet. App. 176a, sworn testimony from a witness for the Chamber that it was "accurate" that "export prices were fixed by enterprises without government intervention" Pet. App. 293a, evidence that certain defendants had sold vitamin C at prices that were both below and above the purportedly "mandatory" price point, Pet. App. 84a-85a, 175a-176a, and statements from Respondents showing that the very notion of a "compulsion" defense had been manufactured for litigation as a way "to do many things in a more hidden and smart way," Pet. App. 178a.

The Second Circuit refused to analyze this evidence based upon its holding that it was "bound to defer" to the Ministry's brief; further, the panel held that it was not permitted to scrutinize the contradictions, gaps, and omissions in the Ministry's brief simply because the Ministry had appeared before the court. Pet. App. 25a-26a. That holding contradicts the law of at least

three other circuits. U.S. Br. 11-13; *cf.* Pet. 23-27 (noting a conflict with five other circuits).

2. The United States and Petitioners also agree that the decision below applied a rigid standard of "conclusive" deference, rather than some flexible standard of deference to only "reasonable" interpretations, as Respondents would have this Court believe. U.S. Br. 9-10; Opp. 19-20, 23, 26-27; Resp. Supp. Br. 4. This is so for at least three reasons.

First, the Second Circuit described its own standard as "conclusive deference." The court classified the potentially applicable precedents into two categories: (1) those that, following the decision in *United States* v. *Pink*, 315 U.S. 203 (1942), had concluded that "an official statement or declaration from a foreign government clarifying its laws must be accepted as 'conclusive'" and (2) those that, relying upon Fed. R. Civ. P. 44.1, "intimated that while the official statements of a foreign government interpreting its laws are entitled to deference, U.S. courts need not accept such statements as conclusive." Pet. App. 20a-21a. The Second Circuit rejected the second category of cases as having "no support," and held that it was relying upon the "conclusive" level of deference articulated by the cases in the first category. Pet. App. 22a-23a.

Second, the Second Circuit's decision stands for the proposition that deference is required whenever a foreign government appears before a court and

articulates a standard that is not facially implausible.[1] At the motion-to-dismiss phase, the only relevant "circumstances" informing the purported reasonableness of the Ministry's position were : (a) the Ministry was the arm of the Chinese Government vested with the authority to regulate trade (but *not* an agency with the authority to *interpret* Chinese law, Pet. 11); and (b) the Ministry had appeared as an amicus with a sworn proffer from one of its attorneys at Sidley Austin LLP (but *not* a sworn declaration from any Chinese Government official, Pet. 17-18 n.5; Pet App. 8a). According to the panel, but for those two circumstances alone, the District Court's conclusions about the meaning of Chinese law would have been "entirely appropriate." Pet. App. 30a n.10.

The reasonableness of the Ministry's legal position was irrelevant under the panel's deference standard. As the panel explained: "If deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations . . . ." Pet. App. 25a-26a. The inability to question the Ministry's legal position is what the Second Circuit meant when it said it was "bound to defer" to that position. Pet. App. 25a. Whatever label

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[1] For example, the Second Circuit noted that deference might be "inappropriate" if "there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws." Pet. App. 25a n.8. This is distinguishable from a situation in which a legal reference *is* proffered but is inapposite or inoperative.

may be applied to such a standard, it is more deferential than either *Chevron* deference or a "substantial deference" standard.

Although the panel analyzed certain of the District Court's evidentiary findings and legal conclusions, Pet. App. 29a-33a, it refused to question the reasonableness of the Ministry's legal position. For example, the District Court found that the text of the regulatory regime cited by the Ministry's brief (the 2002 "PVC Notice") appeared to create voluntary rather than mandatory price coordination objectives, Pet. App. 179a, 185a-86a, and observed that the same notice contained a "suspension provision," which expressly authorized the Chamber to "suspend export price review," Pet. App. 66a, 123a-126a. Neither the panel nor the Ministry ever explained why compliance with both Chinese and U.S. law was "impossible" under the comity doctrine, *see Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 799 (1993), given Respondents' legal authority to "suspend export price review" of vitamin C. Similarly, the panel admitted that the "documentary evidence" showed that the regulatory organization for vitamin C exporters (the "Vitamin C Subcommittee" of the Chamber) had by 2002 "changed from a governmental group whose membership was mandatory to a non-governmental trade organization whose membership was voluntary." Pet. App. 28a n.9. In the face of a voluntary trade organization—which was governed by a voluntary regulatory regime—and evidence that Respondents' actual behavior confirmed the voluntary nature of the

regime,[2] the panel's only answer was that the Ministry's appearance as amicus required the court to accept the Ministry's assertion that the regime mandated price fixing. *See id.*

Third, the panel's inclusion of the phrase "reasonable under the circumstances," Pet. App. 25a, in its holding does not change the mandatory nature of the deference standard. The panel's formulation of its standard is similar to *Chevron* deference, which also requires courts to defer to an agency interpretation of a statute that is reasonable. *Compare, e.g.*, *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."), *with Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (the weight given to an agency construction of law "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

Petitioners thus agree with the United States that the Second Circuit adopted a rule of conclusive deference. Only such a standard could have rendered irrelevant "the Chamber's public statement that

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[2] The evidentiary record confirmed the District Court's legal interpretation of the 2002 PVC Notice and Vitamin C Subcommittee Charter—Respondents regularly exported vitamin C at prices *both below and above* the purportedly mandatory price. *See, e.g.*, Pet. App. 84a-85a, 175a-176a.

respondents had 'voluntarily' agreed on prices and quantities 'without any government intervention,'" the Ministry's failure in its amicus brief to "'address key provisions' of the governing legal regime," and "China's representation to the WTO that it had 'given up export administration of . . . vitamin C." U.S. Br. 10. As the United States explained, "[t]hose circumstances are, at minimum, relevant to the weight that the Ministry's brief should receive," and "[a] standard that does not permit a court even to consider such information is inconsistent with federal courts' responsibility to 'determine foreign law' based on 'any relevant material or source.'" *Id.* (quoting Fed. R. Civ. P. 44.1).

3. The United States is correct that the *Chevron* standard is inappropriate as applied to a foreign government's amicus submission in federal court. U.S. Br. 11-12; *see also* Reply Br. 8. The notion that federal courts are "bound to defer" to foreign sovereign legal interpretations is inconsistent with courts' responsibility to analyze and determine the meaning of foreign law under Rule 44.1. For example, a foreign government might proffer a facially plausible interpretation of a domestic blocking statute that would prohibit the production of foreign documents in U.S. courts, but that position, even if "reasonable under the circumstances," might be unworthy of deference where a federal court determines that the law was not ordinarily enforced, or was enacted in order to frustrate U.S. law. *Cf. Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 527 (1987). Here, the panel's treatment of the Ministry's position as conclusive

caused it to disregard an overwhelming volume of evidence disproving the Ministry's assertion of compulsion. Pet. App. 25a-27a.

4. The consequences of the Second Circuit's rule are unacceptable and warrant this Court's review. Under the Second Circuit's holding, even where a foreign government affirmatively misrepresents its own laws, a federal court would be required to accept those misrepresentations as binding.

The risk of a federal court being presented with a misleading foreign legal statement is not hypothetical—it happened in this case. One of the central authorities on which the Ministry's amicus brief relied was the 1997 Vitamin C Subcommittee Charter. Pet. App. 202a-203a. Citing the 1997 Charter, the Ministry's brief claimed that "defendants were compelled to become participating members" of the Vitamin C Subcommittee, and "would not have been eligible to export vitamin C at all if they failed to participate in these price-setting and production-limiting activities." Pet. App. 212a-213a. That is false—the 1997 Charter was repealed and replaced with a new Charter in 2002. Pet. App. 132a n.45; Pet. App. 68a. And, contrary to the Ministry's representations, the operative Charter by 2002 had eliminated all prior references to mandatory price setting, and made membership in the Vitamin C Subcommittee completely voluntary. Pet. App. 69a,

131a.[3] In other words, by 2002, Respondents could have exported vitamin C without being members of the Subcommittee, and even Subcommittee members could have exported vitamin C without fixing prices. Once this misrepresentation became apparent, the District Court observed that "[t]he Ministry's amicus brief was less than straightforward in its presentation of the 1997 Charter" by implying "that the 1997 Charter was still controlling under the 2002 Regime." Pet. App. 132a n.45.

5. The standard of deference adopted by the Second Circuit was outcome-determinative. The "sole question at issue for comity purposes" below was not simply "whether Chinese law conflicted with U.S. law," Resp. Supp. Br. 11, but rather whether compliance with both

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[3] *Compare* 1997 Charter of Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Dkt. 70-8, No. 1:06-md-01738-BMC-JO (E.D.N.Y. Sept. 22, 2006) (Exhibit G to Respondents' Motion to Dismiss) (providing for mandatory price setting in Articles 7, 10, 15(6), 18, and 19, including that "[t]he Sub-Committee shall coordinate and administrate market, price, customer and operation order of Vitamin C export," art. 7, and that the Sub-Committee "[m]ember's obligations" to "[s]trictly execute export coordinated price set by the Chamber and keep it confidential," art. 15(6)); *with* 2002 Charter of the Vitamin C Subcommittee of the China Chamber of Commerce of Medicines and Health Products Importers and Exporters, Dkt. 394-5 at 172-82, No. 1:06-md-01738-BMC-JO (E.D.N.Y. Nov. 23, 2009) (Exhibit 36 to Respondents' Motion for Summary Judgment) (completely eliminating any mention of price-fixing requirements, including from the "Obligations of Members" section, art. 17, and making membership in the Subcommittee fully voluntary, art. 16).

Chinese and U.S. law was "impossible." *Hartford Fire*, 509 U.S. at 799. The District Court carefully examined the Ministry's brief, the legal materials appended to that brief, and the full evidentiary record before it, and concluded that Respondents had failed to carry their burden of demonstrating that compliance with both Chinese and U.S. law was impossible. Reviewing that decision, the Second Circuit conceded that "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate." Pet. App. 30a n.10. The entire case, therefore, turns on whether the standard of deference triggered by the Ministry's appearance as amicus foreclosed the inquiry that the District Court undertook and resolved in favor of Petitioners.

Respondents once again offer an out-of-context quote from Petitioners' brief below in a desperate effort to suggest that Petitioners conceded that Chinese law required price coordination. Resp. Supp. Br. 10. As Petitioners have explained, the quoted sentence referred to Respondents' legal position, but did not concede the correctness of Respondents' position. Reply Br. 10 n.1. From the start of this case, Petitioners have argued and proved that the Chamber acted voluntarily, without government intervention or compulsion, and that Chinese law did not compel price fixing or output restrictions.

6. The United States and Petitioners agree that the circuit split on the second question presented

implicates an "important question of federal law." U.S. Br. 6, 12; Pet. 27. The question matters for this Court as well as the lower courts. Between 1978 and 2016, foreign sovereigns filed 30 amicus briefs in this Court addressing the content of their own law. Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 Va. L. Rev. 289, 318 (2016). This Court should therefore grant certiorari on the second question presented.

II. This Court Should Grant Review of the Second Question Presented Regardless of Whatever Action It Takes on the First and Third Questions Presented.

Although Petitioners maintain that the Second Circuit erred in ruling on the District Court's order denying respondents' motion to dismiss, and that the doctrine of international comity is an inappropriate basis for dismissal of a claim validly within a federal court's Sherman Act jurisdiction, Petitioners agree with the United States that this Court could limit a grant of certiorari to the second question presented.

With respect to the first question presented, the United States and Petitioners agree that the Second Circuit erred "in focusing on the denial of [respondents'] motion to dismiss and ignoring the subsequent stages of th[e] litigation." U.S. Br. 15 (internal quotation marks omitted) (alterations in original). The United States, however, argues that review of the first question in this Court is not necessary, because "if this Court grants review and holds that the Ministry's brief is not entitled to

conclusive weight, the court of appeals can reconsider the foreign-law issue on remand in light of all of the pertinent record materials." *Id.*

Although the first question presented implicates the Second Circuit's jurisdiction over the pre-trial motion to dismiss under 28 U.S.C. § 1291, it does not implicate *this* Court's jurisdiction under 28 U.S.C. § 1254, or the jurisdiction of the District Court under 28 U.S.C. § 1331. The United States is accordingly correct that this Court can review the second question presented without reviewing the first. Further, in reviewing the second question, this Court would have discretion to consider the full record that was before the Second Circuit, including all evidence developed through discovery and trial, *see, e.g.*, *Ortiz* v. *Jordan*, 562 U.S. 180, 190 nn. 8-9 (2011) (citing excerpts from the trial record to highlight the material that the Sixth Circuit had erroneously ignored by reviewing only the order denying summary judgment), and by undertaking such a review this Court could effectively remedy the Second Circuit's error. Similarly, by vacating the judgment below and remanding for further proceedings, this Court would erase and supersede the Second Circuit's appellate jurisdiction error. Thus, while Petitioners believe that this Court should address the applicability of the rule in *Ortiz* to a post-trial adjudication of a pre-trial motion to dismiss, Petitioners agree that the second question can be reviewed standing alone.

As to the third question presented, the United States disagrees with Petitioners both with respect to whether the question warrants review in this Court and on the merits. U.S. Br. 17-22. Petitioners have

previously explained why the third question warrants review in this Court, Pet. 30-31, Reply Br. 11-13, but agree that this Court could grant review of the second question presented without granting the third.

CONCLUSION

The petition for certiorari should be granted.

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NOVEMBER 28, 2017

No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 28, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

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INTRODUCTION

The Second Circuit unanimously adopted the rule in this case that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 25a. The United States concedes that this articulation of the standard of deference to a foreign government's statement of its own law is "not necessarily [ ] problematic[.]" Br. of U.S. at 9. But it nevertheless recommends that this Court review the decision below because it quibbles with how the Second Circuit applied that standard. *Id.* at 9-13. Such a dispute over the application of a properly stated legal standard to the facts of this case does not create an issue worthy of this Court's review, and the petition for *certiorari* should therefore be denied, the United States' recommendation notwithstanding.[1]

---

[1] Respondents agree with the United States that the first and third questions presented by the Petition do not merit review, and therefore do not address the United States' arguments on those points. Br. of U.S. at 13-22.

I. THE UNITED STATES OVERSTATES THE SECOND CIRCUIT'S NARROW HOLDING AND IGNORES THE SECOND CIRCUIT'S EXPLANATION FOR WHY EVIDENCE OUTSIDE OF THE CHINESE STATUTES AND REGULATIONS AT ISSUE AND THE MINISTRY'S EXPLANATION OF THEM WOULD NOT AID IN CONSTRUING THEM

1. The Second Circuit's holding quoted above provides for deference to the statement of a foreign government regarding the construction of its own law solely under the following conditions: 1) that the foreign government formally appear in the proceedings, 2) that the foreign government provide a sworn evidentiary proffer, and 3) that the construction given to the foreign government's law be reasonable under the circumstances. Pet. App. 25a. This standard does not require absolute deference to foreign sovereigns in all circumstances. A statement made outside of the U.S. court proceedings would not receive deference under this standard, nor would an unadorned assertion by the sovereign unsupported by any proffer of legal materials, nor would a statement that contradicted previous statements regarding the law at issue. Rather, the requirements adopted by the Second Circuit track the requirements imposed by this Court for an agency to receive deference for its legal interpretations: formal decision-making combined with an interpretation not inconsistent with the plain meaning of the legal provisions or otherwise unreasonable under the circumstances. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016); *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

2. Viewed in this light, every statement made by the United States in Point I.A of its brief aligns with the holding below. *See* Br. of U.S. at 6-8. The court below expressly noted that Federal Rule of Civil Procedure 44.1 makes determination of foreign law a question of law and "provide[s] courts with a greater array of tools for understanding and interpreting [foreign] laws." Pet. App. 22a. It contemplates that foreign government statements may occur in a variety of contexts other than a formal appearance by the foreign government. *Id.* 24a-25a & 30a n.10. And it would not credit contradictory statements, statements that are "unclear or unsupported," or statements that "fail[] to address relevant authorities." Br. of U.S. at 8.

Indeed, to the extent that the United States' position is that any statement by a foreign government regarding the construction of its own laws should be evaluated by reference to "the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence" (*id.*), it is difficult to divine what possible daylight would exist between the Second Circuit's position and that of the United States. The Second Circuit simply gives content to the standard by specifying what level of support is needed in the specific context of a formal appearance by the authorized agency of the foreign government (namely, a formal evidentiary proffer) and what standard the statement should be judged by in that specific context (reasonableness under the circumstances).

3. Because the standard articulated by the Second Circuit does not actually deviate from the general views expressed by the United States on the

proper level of deference to a foreign sovereign's statement of its own laws, the United States cannot find an issue worthy of this Court's review without inserting language into the Second Circuit's opinion. The United States contends that "[t]he totality of the court of appeals' opinion . . . indicates that it adopted and applied a far more deferential standard, under which a court is bound to accept a foreign government's characterization—and may not consider other material—unless that characterization is *facially* unreasonable." *Id.* at 9.

That overstates the Second Circuit's narrow holding. The Second Circuit limited conclusive deference to formal statements made before the court that are reasonable under the circumstances. Its finding that the Chinese government's proffer met those criteria does not meaningfully deviate from this Court's finding that a similar statement from the Commissariat of Justice of the Soviet Union merited similar deference in *United States v. Pink*, 315 U.S. 203 (1942). In this case, just as in *Pink*, the Second Circuit found that Ministry had the authority to officially interpret the regulations at issue, and the Second Circuit's finding of reasonableness indicates that the court found the statement complete and not contradicted by any other interpretation of the regulations at issue. Pet. App. 6a-10a & 27a-29a. The Second Circuit's approach thus completely matches the United States' reading of *Pink*, showing that this Court's existing guidance on the question of deference suffices for this case and cases like it. *See* Br. of U.S. at 10-11.

4. Moreover, the Second Circuit did in fact consider and reject the district court's reasoning about extrinsic evidence. *Cf. id.* at 9-10. In particular, it considered and rejected the district court's concerns

that 1) the vitamin C manufacturers may have petitioned the Chinese government to legally mandate the conduct at issue, 2) the laws may not have been rigorously enforced, and 3) that the laws may not have called for "the exact anticompetitive conduct alleged in the complaint[.]" Pet. App. 30a. The court rejected the first concern on the grounds that the reason why the Chinese government adopted the regulations does not determine what the regulations mean; found the second issue unpersuasive given that enforcement or lack of enforcement does not matter for purposes of determining what the regulations meant; and held that the specifics of the mandated prices do not undermine the threshold finding that "the PVC regime, on its face, required Defendants to violate U.S. antitrust laws in the first instance." *Id.* 31a-33a. The court below thus did not disregard matters outside of the Ministry's amicus brief so much as find that the matters raise did not tell the court anything useful about what the regulations at issue meant, let alone render the Ministry's interpretation of its own regulations unreasonable.

5. Other points identified by the United States would not justify a different outcome. The statement that compliance with the government's regulatory regime was accomplished "without any government intervention" (Br. of U.S. at 10) is not at all inconsistent with the Ministry's position in the district court and court of appeals. Directing the companies to come up with a price-fixing agreement that is "voluntary" in the sense that they all agree to it without the government specifying the price to be set *is* directing illegal price fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Achieving joint agreement on price and output

is price fixing and was directed by the Chinese government, as the court of appeals found.

Similarly, there is no reason to consider the World Trade Organization (WTO) statements cited by the district court (Br. of U.S. at 10), for they did not involve construction of the specific regulations at issue. The statements did not occur in the context of a formal interpretation of the 1997 Notice or 2002 Notice. Most importantly, as the Chinese government has explained, representations as to "export administration" before the WTO only meant that quotas were no longer imposed and that special licenses were no longer required. It did not mean that the government was out of all regulation of export-related activity, and there is nothing to suggest otherwise. Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Defendants-Appellants at 27-28, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105 (citing WTO, Council for Trade in Goods, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, G/C/W/438, at 2-3, ¶5(a) (Nov. 20, 2002), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/65661/Q/G/C/W438.pdf and WTO, Trade Policy Review Body, *China Trade Policy Review 2006*, WT/TPR/S/161, at 104 ¶141 & n.120 (Feb. 28, 2006), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?Id=68101&filename=Q/WT/TPR/S161-3.pdf). Indeed, the United States has affirmed the same interpretation of the Chinese export regime before the WTO as that adopted by the Second Circuit here. *See* WTO, Opening Oral Statement of the Complainants at the First Substantive Meeting of the Panel with the Parties, *China—Measures Related to the Exportation*

of Various Raw Materials, WT/DS394/R, WT/DS395/R, WT/DS398/R, ¶31 (Aug. 31, 2010) (arguing that China maintained "a system that prevents exportation unless the seller meets or exceeds the minimum export price."), *available at* https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/Jt.Oral1_.as%20delivered.fin_.(pdf%20version).pdf.

6. Further, the Second Circuit's deference standard does in fact conform to the deference standard of the WTO and other international bodies. *Cf.* Br. of U.S. at 11-12. The WTO has held that "any [WTO] Member can reasonably expect that considerable deference be given to its views on the meaning of its own law." *See* WTO, Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, ¶7.19 (Dec. 22, 1999), *available at* https://www.wto.org/english/tratop_e/dispu_e/wtds152r.pdf.

While this does not mean that *any* proffered interpretation is binding on the WTO (*id.*), it is hard to see how that standard would be inconsistent with an expectation that a formal representation supported by a sworn proffer and reasonable under the circumstances would receive conclusive deference. *See* Pet. App. 25a-26a ("If deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system."). And indeed the U.S. has requested that the WTO afford its statements "considerable deference" when it has made a formal interpretation of its own law to that body. *See* WTO, Second Written Submission of

the United States of America, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221, ¶11 (Mar. 8, 2002), *available at* https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute_settlement/ds221/asset_upload_file327_6455.pdf.[2]

7. The Second Circuit's holding aligns with the substantive views on deference articulated by the United States as well as international standards, and the only way the United States comes to the view that the holding is in error is by giving it a much broader reading than the opinion below will bear. This Court should therefore decline to review this case, for it does not actually raise the concerns claimed by the United States.

II. THE CASES CITED BY THE UNITED STATES DO NOT CONFLICT WITH THE HOLDING BELOW

1. The United States cites three cases purportedly in conflict with the decision below. Br. of U.S. at 12-13. All three were addressed in Respondent's brief in opposition (BIO at 20-22 & 23-24), so Respondents will only briefly address here why they do not conflict with the decision below.

2. The first is *In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992). In that case, the Seventh Circuit deferred to the French government's interpretation of its own law. *Id.* at 1312-13. The court actually stated that the appearance of the French government made it unnecessary for the court

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[2] The United States' footnote citations to treaties to which it is not a party are therefore not persuasive. Br. of U.S. at 12 n.2.

to assess whether the interpretation favored by the French State was correct. *Id.* at 1312 ("If all of the litigants were private parties, we would need to decide whether this understanding of the law is correct."). And it expressly analogized its deference to the deference accorded to U.S. administrative agencies that, as noted above, is functionally identical to the standard of deference articulated by the Second Circuit in this case. *See id.* ("Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable."); *see also supra* at 2.

2. *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), likewise does not conflict with the Second Circuit's holding below. In that case, the Honduran government made a formal representation as to the validity of its laws during the pre-trial stages of a criminal litigation, but then completely reversed its position after the defendants had been convicted. *Id.* at 1241-42. Faced with that highly unusual circumstance, and with finality concerns firmly in mind, the Eleventh Circuit declined to unsettle a judgment premised on the Honduran government's original representation. By contrast, in this case, the Chinese government's position has remained consistent from the time of the motion to dismiss to the time of appellate review, and the United States identifies no contradictory construction of the specific regulations at issue in this case that would justify denial of deference.

3. Finally, the United States cites *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001). In that case, Iran's arguments regarding the impact of its corporate law conflicted with its own representations as to the content of the law. *Id.* at 1108-09. That quite obviously made Iran's

claims unreasonable under the circumstances on the basis of its own proffer. Thus, the passage in *McKesson* cited by the United States does not even conflict with a broad reading of the Second Circuit's holding below, let alone the narrow holding the court actually articulated.

4. Aside from the United States' contention regarding the purported circuit conflict, the United States offers no compelling reason for further review by this Court. Since all of the cases cited by the United States are clearly reconcilable, this case does not merit review by this Court.

III. ACCEPTING THE UNITED STATES' POSITION WOULD NOT ALTER THE OUTCOME OF THE CASE

1. Notably absent from the United States' brief is any indication as to how modifying the Second Circuit's reasoning in the way the United States advocates would actually alter the ultimate outcome in this case. In fact, the United States never actually claims the district court's judgment should have been affirmed or that international comity abstention should not have resulted in dismissal of Petitioners' claims.

2. This omission is quite understandable. As Petitioners observed in their Second Circuit briefing, "Chinese law . . . required the Chamber and its Subcommittee to actively coordinate to set vitamin C export prices and quantities." Final Form Brief for Plaintiffs-Appellees, at 25, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Aug. 11, 2014), ECF No. 174 (citation and internal marks omitted). Under this Court's holdings in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), and multiple other cases, that amounts to a concession that Chinese law

required Respondents to violate the Sherman Act. *See* BIO at 17-19.

The sole question at issue for comity purposes before this Court is whether Chinese law conflicted with U.S. law. It is undisputed for purposes of this Court's review that every other comity factor favors dismissal, Br. of U.S. at 20, leaving conflict the only issue to be resolved. As the conflict between U.S. and Chinese law is beyond dispute for the reasons just given, even a modification of the Second Circuit's reasoning by this Court could not possibly result in anything but affirmance of the Second Circuit's core holding that Chinese law mandated conduct that U.S. law prohibited, making dismissal on comity grounds appropriate. There is thus no reason to believe that tweaking the articulation of the legal standard or altering its application as proposed in the United States' brief would actually result in a different judgment.

CONCLUSION

For the foregoing additional reasons, the petition for a writ of *certiorari* should be denied.

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In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL., PETITIONERS

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law.

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In the Supreme Court of the United States

No. 16-1220

ANIMAL SCIENCE PRODUCTS, INC., ET AL., PETITIONERS

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This Court granted certiorari to consider what weight a federal court deciding an issue of foreign law should give to a submission from a foreign government characterizing its own law. The United States has a substantial interest in that question because it affects both the enforcement of federal statutes and the Nation's foreign relations. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 44.1 provides as follows:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may

consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

STATEMENT

This Court granted certiorari to consider whether and under what circumstances a federal court deciding an issue of foreign law under Federal Rule of Civil Procedure 44.1 must treat as conclusive a submission expressing the views of the relevant foreign government. That question can arise in a variety of legal and factual contexts. In the proceedings below, the defendants in a federal antitrust suit contended that they could not be held liable because Chinese law mandated their anticompetitive conduct. They relied in part on an amicus brief in which an agency of the Chinese government endorsed that characterization of Chinese law.

1. Petitioners are two U.S. companies that purchase vitamin C. Respondents are two Chinese exporters of vitamin C. In 2005, petitioners filed a class-action suit against respondents and other Chinese exporters, alleging that they had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by fixing the prices and quantities of vitamin C exported to the United States. Petitioners alleged that the conspiracy had begun in 2001 and that it was accomplished through a membership organization known as the China Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Pet. App. 2a, 4a-5a.

2. Respondents moved to dismiss the complaint. They did not deny that they had fixed the prices and quantities of vitamin C exported to the United States. Pet. App. 163a. Instead, they asserted that their actions

had been compelled by Chinese law and that petitioners' claims were therefore barred by the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity. *Ibid.*

The act of state doctrine may bar a claim that would require a court "to declare invalid [an] official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The foreign sovereign compulsion doctrine provides a limited defense to antitrust liability when a foreign government has required the defendant to engage in the specific conduct that violated the antitrust laws. See *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293-1294 (3d Cir. 1979). And in exceptional cases, principles of international comity may justify the dismissal of a private antitrust suit challenging conduct that occurred abroad. See *id.* at 1297-1298. Here, respondents' invocation of each of those doctrines rested on their assertion that Chinese law had required them to fix the prices and quantities of vitamin C exports. Pet. App. 167a-168a.

The Ministry of Commerce of the People's Republic of China (Ministry) filed an amicus brief supporting respondents' motion to dismiss. Pet. App. 168a; see *id.* at 189a-223a. The Ministry had entered into a joint-defense agreement with respondents and the Chamber. *Id.* at 237a. The Ministry explained that it is "the equivalent * * * of a cabinet level department" and the entity within the Chinese government that regulates foreign trade. *Id.* at 190a. The Ministry stated that the Chamber was a state-supervised entity authorized to regulate vitamin C exports. *Id.* at 201a. And the Ministry argued that Chinese law in force during the relevant period had "compelled" respondents "to coordinate export

prices and maximum export volumes" on pain of "severe penalties." *Id.* at 212a-213a.

Petitioners disputed that understanding of Chinese law. They noted that the Chamber had publicly described the exporters' agreement on vitamin C prices and quantities as a "self-regulated agreement" that was adopted "voluntarily" and "without any government intervention." Pet. App. 173a-174a (citation and emphases omitted). Petitioners also submitted evidence acquired through limited discovery, which in their view showed that respondents and other Chinese exporters had "voluntarily restricted export volume and fixed prices for vitamin C." *Id.* at 175a.

The district court denied the motion to dismiss. Pet. App. 157a-188a. The court held that the Ministry's description of Chinese law was "entitled to substantial deference." *Id.* at 181a. But it declined to treat the Ministry's brief as "conclusive," based in part on its view that "the plain language of the documentary evidence submitted by [petitioners] directly contradict[ed] the Ministry's position." *Ibid.* Under those circumstances, the court found the record "too ambiguous to foreclose further inquiry" into Chinese law. *Id.* at 186a.

3. After additional discovery, respondents moved for summary judgment, again invoking the act of state doctrine, the foreign sovereign compulsion defense, and principles of international comity. Pet. App. 55a. The Ministry submitted a statement reiterating its position that Chinese law had compelled respondents' conduct. *Id.* at 97a n.24; see J.A. 247-251. Petitioners cited additional evidence supporting their contrary view, including documents in which China had represented to the World Trade Organization (WTO) that it "gave up 'export administration ... of vitamin C'" at the end of

2001. Pet. App. 74a (citation omitted). The district court denied respondents' summary-judgment motion, concluding that Chinese law "did not compel their illegal conduct." *Id.* at 56a; see *id.* at 54a-156a.

a. The district court explained that, under Federal Rule of Civil Procedure 44.1, the determination of foreign law "is an issue of law" to be decided based on "any relevant material or source." Pet. App. 93a (citations omitted). The court concluded that a foreign government's characterization of its laws warrants deference, but is not "entitled to absolute and conclusive deference." *Id.* at 97a. Here, the court accepted the Ministry's "explanation of the relationship between the Ministry and the Chamber," but "respectfully decline[d] to defer to the Ministry's interpretation" of the Chinese law governing respondents' conduct. *Id.* at 117a-118a.

The district court gave several reasons for declining to adopt the Ministry's view. First, it emphasized that the Ministry's submissions had "fail[ed] to address critical provisions of the [governing legal regime] that, on their face, undermine its interpretation." Pet. App. 119a; see *id.* at 97a & n.24, 132a-133a. Second, the court noted that the Ministry's most recent statement "d[id] not cite" legal authorities, *id.* at 120a, and that the Ministry's earlier amicus brief "was less than straightforward" because it implied that a 1997 regime remained in force even though that regime had been "superseded" in 2002, *id.* at 132a n.45. Third, the court emphasized that the Ministry had "ma[de] no attempt to explain China's representations [to the WTO] that it gave up export administration of vitamin C"—representations that "appear[ed] to contradict the Ministry's position." *Id.* at 121a. Under those circumstances, the court concluded that "the Ministry's assertion of compulsion

[wa]s a post-hoc attempt to shield [respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period." *Id.* at 121a-122a.

b. The district court then conducted its own analysis of the "traditional sources" for determining foreign law, including the relevant "governmental directives" and the records kept by the Chamber and by respondents. Pet. App. 117a & n.36; see *id.* at 122a-155a. The court determined that, although the Ministry may have supported respondents' actions, Chinese law did not compel them to fix the prices and quantities of vitamin C exports.

The district court concluded, for example, that exporters had "unilateral authority to suspend" the legal regime that assertedly required them to adhere to agreed-upon prices. Pet. App. 124a. The court stated that this authority "standing alone" was "sufficient reason to deny summary judgment." *Id.* at 125a. The court further explained that, even if Chinese law had required respondents to agree on and adhere to minimum prices, it did not compel their agreements to limit quantities. *Id.* at 126a-127a. The court stated that the factual record reinforced its view, because there was no evidence that Chinese exporters had faced penalties for failing to adhere to agreed-upon quantities or for "failing to reach agreements [on prices or quantities] in the first instance." *Id.* at 151a; see *id.* at 149a-151a.

c. In the absence of compulsion by Chinese law, the district court held that respondents were not entitled to summary judgment under any of the doctrines they had invoked. Pet. App. 98a-115a. With respect to international comity, the court determined that other comity considerations did not support dismissal because this case was "no different than any other worldwide price-

fixing conspiracy by foreign defendants that includes the United States as one of its primary targets." *Id.* at 102a; cf. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

4. The case proceeded to trial, and a jury found that respondents had agreed to fix the prices and quantities of vitamin C exports. Pet. App. 11a; see *id.* at 276a-279a.[1] The jury also found that respondents were not "actually compelled" by China to enter into those agreements. *Id.* at 278a. The district court entered judgment for petitioners, awarding roughly $147 million in treble damages and enjoining respondents from further violations of the Sherman Act. *Id.* at 11a.

5. The court of appeals reversed. Pet. App. 1a-38a. The court held that the district court should have granted respondents' motion to dismiss based on comity, and it remanded with instructions to dismiss petitioners' complaint with prejudice. *Id.* at 38a.

The court of appeals based its comity analysis on a "multi-factor balancing test" drawn from *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 614-615 (9th Cir. 1976), and *Mannington Mills*, 595 F.2d at 1297-1298. Pet. App. 14a-15a. The court focused primarily on the first factor, which asks whether there was a "true conflict" between U.S. and Chinese law—that is, whether "Chinese law required [respondents] to enter into horizontal price-fixing agreements." *Id.* at 19a.

The court of appeals stated that the answer to that question "hinge[d] on the amount of deference" owed to the Ministry's characterization of Chinese law. Pet.

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[1] Respondents' co-defendants settled before or during the trial. Pet. App. 39a n.1.

App. 20a. The court acknowledged that some courts have declined to "accept such statements as conclusive." *Id.* at 20a-21a. But the court disagreed with those decisions, holding instead that when a foreign sovereign "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer." *Id.* at 25a.

The court of appeals then held, based on the Ministry's amicus brief, that "Chinese law required [respondents] to engage in activities in China that constituted antitrust violations here in the United States." Pet. App. 27a. In reaching that conclusion, the court generally limited its inquiry to the analysis in the Ministry's brief. It did not consider the apparently contradictory statements and authorities on which the district court had relied, and it did not address the district court's criticisms of the Ministry's submissions. *Id.* at 27a-33a.

Having found a true conflict, the court of appeals stated that the remaining comity factors "clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction." Pet. App. 33a. The court noted, for example, that respondents are Chinese companies, that their conduct had occurred in China, and that (according to the Ministry) this suit had "negatively affected U.S.-China relations." *Id.* at 34a-35a.

SUMMARY OF ARGUMENT

When a federal court deciding a question of foreign law under Rule 44.1 is presented with the views of the relevant foreign government, it should ordinarily afford those views substantial weight. But the ultimate responsibility for determining the governing law lies with the

court, which is neither bound to adopt the foreign government's characterization nor barred from considering other materials that support a different interpretation.

A. Until 1966, federal courts followed the common-law rule that foreign law must be pleaded and proved as a fact. Rule 44.1 abandoned that cumbersome approach and sought to align the process of determining foreign law more closely with the process of determining domestic law. The rule specifies that issues of foreign law must be decided as questions of law, and it grants courts broad latitude to determine foreign law based on "any relevant material or source." Fed. R. Civ. P. 44.1.

B. Federal courts determining foreign law are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But courts have correctly recognized that the appropriate weight depends on the circumstances. Given the diversity of foreign legal systems and the wide range of ways in which foreign governments present their views to U.S. courts, those circumstances cannot be reduced to a formula or rule. The relevant considerations include the interpretation's clarity, thoroughness, and support; its context and purpose; the nature and transparency of the foreign legal system; the role and authority of the entity or official offering the interpretation; its consistency with the foreign government's past positions; and any other corroborating or contradictory materials.

C. The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings" and offers an interpretation that is "reasonable under the circumstances," "a U.S. court is bound to defer." Pet. App. 25a. In applying that standard, the

court limited its inquiry to the analysis in the Ministry's brief. *Id.* at 27a-29a. The court thus effectively held that a federal court is bound to adopt a foreign government's submission characterizing its own law so long as it is *facially* reasonable. That rigid rule is unsound.

1. The court of appeals' approach departs from the policies embodied in Rule 44.1. A rule that does not permit a court even to consider relevant information casting doubt on a foreign government's submission is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1. And a rule that a federal court must accept any facially reasonable litigating position a foreign government may assert concerning its own laws is inconsistent with Rule 44.1's direction that courts are free to look beyond the parties' submissions to reach accurate conclusions about the meaning of foreign law.

2. The court of appeals' approach is also inconsistent with federal courts' treatment of submissions by U.S. States characterizing their laws. This Court has held that such submissions are entitled to significant but not controlling weight. Nothing in the text, history, or purposes of Rule 44.1 suggests that a federal court must give greater weight to a submission from a foreign sovereign than it would give to a similar submission from a domestic one.

3. The court of appeals believed that its rigid approach was compelled by *United States* v. *Pink*, 315 U.S. 203 (1942). In that case, which predated Rule 44.1, this Court stated that an "official declaration by the Commissariat of Justice" of the Russian Socialist Federal Soviet Republic was "conclusive" evidence of the extraterritorial reach of a Russian decree. *Id.* at 218,

220. But that statement was premised on a finding that the Commissariat "ha[d] power to interpret existing Russian law," *id.* at 220, and there was no indication that the declaration—which had been obtained by the United States through diplomatic channels—was subject to question. The Court's statement that the declaration was "conclusive" under those unusual circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

4. The court of appeals also reasoned that a foreign government should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. But the United States has not argued that foreign courts are bound to accept its characterizations of U.S. law or precluded from considering other relevant material, and we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight.

D. Because the court of appeals concluded that the district court was bound to defer to the Ministry's amicus brief, it did not review "the district court's careful and thorough treatment" of the materials bearing on the meaning of Chinese law. Pet. App. 30a n.10. The question whether the district court correctly interpreted Chinese law is not before this Court, and we do not take a position on it. But the materials the district court identified were, at minimum, relevant to the question whether Chinese law required respondents' conduct. The Court should therefore vacate the decision below and remand to allow the court of appeals to consider that question under the correct standard.

ARGUMENT

A FEDERAL COURT DETERMINING FOREIGN LAW IS NOT BOUND BY THE VIEWS EXPRESSED IN A SUBMISSION FROM THE RELEVANT FOREIGN GOVERNMENT

Federal Rule of Civil Procedure 44.1 provides that a federal district court faced with a question of foreign law should resolve it as a matter of law and may base its determination on "any relevant material or source." A submission expressing the views of the foreign government is highly relevant, and courts should ordinarily afford such submissions substantial weight. As in other contexts, however, the ultimate responsibility for determining the governing law lies with the court. The court is neither bound to adopt the characterization urged by the foreign government nor barred from considering materials that support a different interpretation.

A. Rule 44.1 Grants Federal Courts Broad Latitude To Decide Questions Of Foreign Law Based On Any Relevant Material Or Source

1. Federal courts encounter questions of foreign law in many different contexts. In some cases, choice-of-law principles point to foreign law as the rule of decision for the parties' dispute. See, *e.g.*, *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 3-4 (1975) (per curiam). In others, foreign law controls or bears upon a specific issue in a case that is otherwise governed by U.S. law:

- As this case illustrates, foreign law may in some circumstances prevent the imposition of liability under the U.S. antitrust laws. See p. 3, *supra*.
- The Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A), impose civil and criminal penalties for the importation of "fish or wildlife taken, possessed, transported, or sold in violation of * * *

any foreign law." See, *e.g.*, *United States* v. *Mitchell*, 985 F.2d 1275, 1279-1280 (4th Cir. 1993).

- A mail- or wire-fraud prosecution may be based on a scheme to defraud involving foreign property, which may require "a court to recognize foreign law to determine whether the defendant violated U.S. law." *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005).
- The application of the federal tax laws sometimes turns on "foreign law." *Guardian Indus. Corp.* v. *United States*, 477 F.3d 1368, 1371 (Fed. Cir. 2007) (citation omitted) (credits for payment of foreign taxes).
- A contract governed by foreign law may provide a defense to a claim under federal intellectual-property law. See, *e.g.*, *Bodum USA, Inc.* v. *La Cafetiere, Inc.*, 621 F.3d 624, 625-628 (7th Cir. 2010).
- A foreign law prohibiting disclosure may in some circumstances excuse or affect the remedy for noncompliance with an order requiring the production of documents located abroad. See *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 544-546 & n.29 (1987) (*Aérospatiale*).
- Federal Rule of Civil Procedure 4(f), which governs service of process in a foreign country, incorporates "the foreign country's law for service in that country." Fed. R. Civ. P. 4(f)(2)(A); see, *e.g.*, *Prewitt Enters., Inc.* v. *Organization of Petroleum Exporting Countries*, 353 F.3d 916, 923-

924 & n.11 (11th Cir. 2003), cert. denied, 543 U.S. 814 (2004).

2. English and American common law treated foreign law "as a question of fact to be pleaded and proved as a fact by the party whose cause of action or defense depend[ed] upon alien law." Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 617 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 37-38 (1801); see, *e.g.*, *Church* v. *Hubbart*, 6 U.S. (2 Cranch) 187, 236-237 (1804) ("Foreign laws are well understood to be facts.").

Treating questions of foreign law as questions of fact "had a number of undesirable practical consequences." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2441, at 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Courts were restricted to the evidence submitted by the parties. *Ibid.* And appellate review was deferential and limited to the record made in the trial court. *Ibid.*

After the adoption of the Federal Rules of Civil Procedure in 1938, some federal courts began to invoke state procedures that departed from the common-law approach by allowing courts to take judicial notice of foreign law. Miller 654-656; see Fed. R. Civ. P. 43(a) (1964) (incorporating state evidentiary rules). But those state procedures varied, and some were "time consuming and expensive." Fed. R. Civ. P. 44.1 advisory committee's note (1966) (Adoption) (Advisory Committee's Note).

The process of determining foreign law thus remained "cumbersome." *Pasquantino*, 544 U.S. at 370.

3. In 1966, this Court promulgated Rule 44.1 to "furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country." Advisory Committee's Note. The rule accomplishes that goal by providing that, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. The rule also specifies that the court's determination "must be treated as a ruling on a question of law," rather than as a finding of fact. *Ibid.*[2]

Rule 44.1 "improves on [the procedures] available at common law." *Pasquantino*, 544 U.S. at 370. By allowing courts to rely on any relevant material, regardless of its admissibility under the Federal Rules of Evidence, the rule "provides flexible procedures for presenting and utilizing material on issues of foreign law." Advisory Committee's Note. By specifying that the court's determination is a conclusion of law, the rule ensures de novo appellate review. *Ibid.* And by providing that courts are not limited to materials submitted by the parties, the rule recognizes that courts "may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." *Ibid.* The "obvious" purpose of those changes was "to make the process of determining alien law identical with the method of ascertaining domestic law to the

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[2] Federal Rule of Criminal Procedure 26.1 establishes "substantially the same" rule for criminal cases. Fed. R. Crim. P. 26.1 advisory committee's note (1966) (Adoption). Given that similarity, this brief relies on decisions applying both rules.

extent that it is possible to do so." 9A Wright & Miller § 2444, at 338-342.

Courts deciding questions of foreign law under Rule 44.1 rely on a variety of materials, including "[s]tatutes, administrative materials, and judicial decisions"; "secondary sources such as texts and learned journals"; "expert testimony"; and "any other information" that may be probative. 9A Wright & Miller § 2444, at 342-343 (3d ed. 2008 & Supp. 2017). In evaluating those materials, a court "is free * * * to give them whatever probative value [it] thinks they deserve." *Id.* at 343. The guiding principle is that courts "should use the best of the available sources" to reach an accurate interpretation of foreign law. *Bodum USA*, 621 F.3d at 628.

B. A Foreign Government's Characterization Of Its Own Law Is Ordinarily Entitled To Substantial Weight, But Is Not Binding On Federal Courts

Federal courts deciding questions of foreign law under Rule 44.1 are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But the appropriate weight in each case will depend on the circumstances, and a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials.

1. Federal courts considering questions of foreign law may be presented with the views of the relevant foreign government through a variety of formal and informal mechanisms. Often, the foreign state (or one of its agencies or instrumentalities) is itself a party to the litigation. See, *e.g.*, *Northrop Grumman Ship Sys., Inc.* v. *Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 496-498 & n.8 (5th Cir. 2009); *McKesson*

HBOC, Inc. v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001) (*McKesson*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1289, 1312 (7th Cir. 1992) (*Amoco Cadiz*).

As this case illustrates, foreign governments (and their agencies and officials) may also express their views through amicus briefs or similar submissions in cases where no foreign governmental entity is a party. Pet. App. 189a-223a; see, *e.g.*, *United States* v. *McNab*, 331 F.3d 1228, 1239-1240 & n.23 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). Alternatively, a party may submit an affidavit or testimony from a foreign official. See, *e.g.*, *United States* v. *Schultz*, 333 F.3d 393, 400-401 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1109-1110 (S.D. Fla. 1988). Or a party may rely on an interpretation that the relevant foreign sovereign has issued outside the context of the litigation. See, *e.g.*, *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (letter from a Chilean agency); *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (circular issued by a Mexican agency), cert. denied, 531 U.S. 917 (2000).

2. Neither Rule 44.1 nor any other rule or statute specifically addresses the weight that a federal court determining foreign law should give to the views of the foreign government. As a general matter, courts in deciding such questions should be guided by principles of international comity, "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Aérospatiale*, 482 U.S. at 543 n.27. In other

contexts, this Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Id.* at 546. To afford appropriate respect for "[t]he dignity of a foreign state," *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008), a federal court should carefully consider that state's proffered views about the meaning of its own laws.

Granting substantial weight to the views of the relevant foreign government is also eminently sensible. "Among the most logical sources for [a] court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country," who are intimately familiar with the context and nuances of the foreign legal system. *McNab*, 331 F.3d at 1241; cf. *Bodum USA*, 621 F.3d at 638-639 (Wood, J., concurring) (noting the risk that an unaided U.S. reader may "miss nuances in the foreign law"). Ordinarily, a court therefore "reasonably may assume" that interpretations offered by the relevant foreign agencies or officials "are a reliable and accurate source" of the meaning of foreign law. *McNab*, 331 F.3d at 1241.

3. The federal courts have generally adhered to the foregoing principles. Courts have recognized that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), cert. denied, 539 U.S. 904 (2003); see, *e.g.*, *Access Telecom*, 197 F.3d at 714 ("[C]ourts may defer to foreign government interpretations."); *Amoco Cadiz*, 954 F.2d at 1312 ("A court of the United States owes substantial deference to the construction France places on its domestic law."). In *Abbott*, for example, this Court

stated that the views of a Chilean agency were "notable" and "support[ed] the [Court's] conclusion" about the meaning of Chilean law. 560 U.S. at 10.

Courts have not, however, treated a foreign government's characterization of its own law as binding. Instead, they have recognized that the weight given to such a characterization should depend on the circumstances. For example, when "a foreign government changes its original position" or otherwise makes conflicting statements, a court is not bound to accept its most recent statement, or the one offered in litigation. *McNab*, 331 F.3d at 1241; see, *e.g.*, *Export-Import Bank of the Republic of China* v. *Central Bank of Liberia*, No. 15-cv-9565, 2017 WL 1378271, at *4 (S.D.N.Y. Apr. 12, 2017). A court likewise may decline to adopt an interpretation if it is unclear or unsupported, if it fails to address relevant authorities, or if it is implausible in light of other relevant materials. See, *e.g.*, *Themis Capital, LLC* v. *Democratic Republic of Congo*, 626 Fed. Appx. 346, 348 (2d Cir. 2015); *McKesson*, 271 F.3d at 1108-1109.

4. In describing the weight that should be given to a foreign government's views about its own law, parties and lower courts have sometimes borrowed domestic administrative-law standards. See, *e.g.*, Resp. Supp. Br. 2-3; *Amoco Cadiz*, 954 F.2d at 1312. In our view, such analogies are generally unhelpful because those standards are grounded in domestic considerations. For example, courts defer to reasonable agency interpretations under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), in specific circumstances, including when Congress has "delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was

promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The standard articulated in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), is more flexible, but it too has domestic-law roots and a specific meaning acquired through repeated domestic applications. See *Mead*, 533 U.S. at 234-235.

Those administrative-law doctrines do not readily translate to the Rule 44.1 context. "[T]he world's many diverse legal and governmental systems" differ greatly from ours and from each other. *McNab*, 331 F.3d at 1237 (citation omitted). The views of foreign governments about those varying systems are presented to the federal courts under a wide range of differ[illegible]ircumstances. And the submissions themselves diff[illegible]reatly in their formality, thoroughness, and authority. See pp. 16-17, *supra*. Deference standards that were crafted for specific areas of federal administrative law and that carry decades of accumulated domestic-law meanings are ill-suited for this very different context.

5. Rather than transplanting a standard from domestic administrative law, a federal court confronted with a disputed question of foreign law should proceed in the same manner as a court facing any other unsettled legal question: By seeking to resolve it "with the aid of such light as is afforded by the materials for decision at hand." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 227 (1991) (brackets and citation omitted). As this Court emphasized in addressing the analogous problem of determining the law of former Mexican territories before their annexation into the United States, "it has always been held that it is for the court to decide what weight is to be given" to the legal materials available in

a particular case. *Fremont* v. *United States*, 58 U.S. (17 How.) 542, 557 (1855).

When those materials include an interpretation by the relevant foreign government, that interpretation should be afforded respectful consideration and will ordinarily be entitled to substantial weight. The precise weight that is appropriate in a particular case will necessarily depend on the circumstances. Those circumstances are too diverse to be reduced to a formula or rule, but the relevant considerations include the interpretation's clarity, thoroughness, and support; its context and purpose; the nature and transparency of the foreign legal system; the role and authority of the entity or official offering the interpretation; its consistency with the foreign government's past positions; and any other corroborating or contradictory materials.[3]

C. The Court Of Appeals Erred By Treating The Ministry's Amicus Brief As Binding And By Disregarding Other Relevant Materials

The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented,

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[3] As we explained in our petition-stage brief (at 8-9 n.1), the United States' amicus brief in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), suggested a somewhat more deferential approach. The position we advocate here is consistent with the United States' more recent brief in *McNab*, which endorsed what had by then become the courts of appeals' general practice of affording "substantial—but measured—deference to a foreign nation's representations." U.S. Br. in Opp. at 16-17, *McNab* v. *United States*, 540 U.S. 1177 (2004) (No. 03-622).

a U.S. court is bound to defer." Pet. App. 25a. In applying that standard and concluding that the Ministry's characterization of Chinese law was "reasonable," the court generally limited its inquiry to the four corners of the Ministry's brief and the sources cited therein. *Id.* at 27a-29a. The court also emphasized that a federal court may not "embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations." *Id.* at 26a.

In practical effect, therefore, the court of appeals held that a federal court is bound to adopt a foreign government's submission characterizing its own law—and may not consider other relevant material—so long as that characterization is *facially* reasonable.[4] That rigid rule is inconsistent with the policies underlying Rule 44.1 and with this Court's treatment of analogous submissions from U.S. States. And the court of appeals erred in concluding that its approach was supported by *United States* v. *Pink*, 315 U.S. 203 (1942), or by considerations of comity and reciprocity.

1. The court of appeals' rule of binding deference is inconsistent with the policies embodied in Rule 44.1

As the court of appeals observed, Rule 44.1 does not expressly address the weight a federal court should give to a foreign government's submission characterizing its laws. Pet. App. 22a. In at least two respects, however, the court's approach departs from the policies embodied in that rule.

a. Rule 44.1 seeks to align the treatment of foreign and domestic law by providing district courts with

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[4] The court of appeals left open the possibility that "deference may be inappropriate" if the foreign government's submission includes "no documentary evidence or reference of law." Pet. App. 25a n.8.

broad latitude to "determin[e] foreign law" based on "any relevant material or source." That direction reflects a judgment that "whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials." 9A Wright & Miller § 2444, at 351.

The court of appeals' approach is inconsistent with that sound policy because it precludes a court from considering other relevant material whenever it is presented with a facially reasonable submission from a foreign government. Here, for example, the district court concluded that the Ministry's submissions "fail[ed] to address critical provisions of the [governing legal regime]," Pet. App. 119a, and that they incorrectly implied that a superseded legal regime "was still controlling," *id.* at 132a n.45. The court also highlighted, *inter alia*, China's statement to the WTO that it had "g[i]ve[n] up 'export administration ... of vitamin C'" at the end of 2001, *id.* at 74a (citation omitted), and the Chamber's statements that respondents had "voluntarily" agreed on prices and quantities "without any government intervention," *id.* at 173a-174a (citation and emphases omitted).

The court of appeals did not conclude that the district court's reliance on that material was substantively wrong or irrelevant to the proper interpretation of Chinese law. To the contrary, it stated that, "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence * * * would have been entirely appropriate." Pet. App. 30a n.10. But because the Ministry had filed a brief that the court deemed facially reasonable, it concluded that the district court had erred by considering

additional material and thereby "embark[ing] on a challenge to [the Ministry's] official representation." *Id.* at 26a. A standard that does not permit a court even to consider such relevant information is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1.

b. The court of appeals also departed from the policies embodied in Rule 44.1 by placing dispositive weight on the fact that the Ministry had "directly participate[d]" in the litigation by offering what the court called a "sworn evidentiary proffer." Pet. App. 25a; see *id.* at 23a (distinguishing a case in which the foreign government "did not appear before the court"). That is true for two reasons.

First, the court of appeals' characterization of the Ministry's submission as "a sworn evidentiary proffer," Pet. App. 25a, was inapt. Rule 44.1 abrogated the common-law rule treating questions of foreign law as questions of fact, and it specifies that a district court's determination of an issue of foreign law "must be treated as a ruling on a question of law." Although the Ministry's amicus brief was surely relevant to the district court's determination whether Chinese law required the anticompetitive conduct at issue in this case, that legal brief was neither a "sworn" document nor an "evidentiary proffer." See Pet. Br. 35-36. By the same token, a court that considers but ultimately rejects a foreign government's characterization of its laws does not thereby accuse the foreign government of misrepresenting the pertinent facts. Cf. pp. 26-27, *infra* (explaining that federal courts give significant but not controlling weight to a state attorney general's characterization of state law).

Second, the court of appeals erred by holding that greater deference is required when a foreign government participates directly in litigation. That fact may bear on the weight a foreign government's views should receive. It ensures, for example, that the government has focused on the specific foreign-law issue that is actually before the court. But many other factors also bear on the weight that should be afforded to a foreign government's interpretation, see p. 21, *supra*, and the court of appeals did not explain why it placed dispositive weight on this single consideration. In some circumstances, moreover, a U.S. court might justifiably view a pronouncement prepared for litigation purposes with greater skepticism than it would view a similar pronouncement drafted with no specific controversy in mind. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The court of appeals' rule, moreover, would automatically inure to the benefit of any foreign government that appears in U.S. court as a plaintiff or defendant in a case controlled in whole or in part by its domestic laws—a relatively common occurrence.[5] The court identified no sound reason why a federal court should be

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[5] See, *e.g.*, *Themis Capital*, 626 Fed. Appx. at 348 (suit against the Democratic Republic of Congo to recover debt); *Karaha Bodas*, 313 F.3d at 75, 92 (action to execute on assets owned by Indonesia); *Northrop Grumman Ship Sys.*, 575 F.3d at 496-498 & n.8 (suit against Venezuela for contract damages claimed to be governed in part by Venezuelan law); *McKesson*, 271 F.3d at 1103 (suit against Iran arising out of expropriation of property); *DRC, Inc.* v. *Republic of Honduras*, 71 F. Supp. 3d 201, 209-210 & n.7 (D.D.C. 2014) (suit against Honduras to enforce arbitral award); *Republic of Ecuador* v. *ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 460-461 (S.D.N.Y.

bound, in any suit to which a foreign government is a party, by whatever facially reasonable litigating position that party may assert concerning the proper understanding of its own laws. That result would be particularly anomalous because Rule 44.1 allows courts to look beyond the "material presented by the parties" specifically to ensure that courts have the ability to "reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." Advisory Committee Note. That consideration applies with full force when the litigant is a foreign government.

2. The court of appeals' rule of binding deference is inconsistent with this Court's treatment of analogous submissions from U.S. States

The court of appeals' rule of binding deference is inconsistent with this Court's approach in the other principal circumstance in which federal courts are presented with the views of other sovereigns on the proper interpretation of their laws. When federal courts receive submissions by U.S. States addressing the proper interpretation of state law, the courts give those submissions significant but not controlling weight. Nothing in the text, history, or purposes of Rule 44.1 suggests that a federal court determining foreign law must give greater weight to the views of a foreign sovereign.

This Court has long held that "[t]he law of any State of the Union * * * is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar* v. *Micou*, 114 U.S. 218, 223

2007) (suit by Ecuador seeking to stay arbitration); *Republic of Turkey* v. *OKS Partners*, 146 F.R.D. 24, 27-28 (D. Mass. 1993) (suit by Turkey to recover artifacts); *Government of Peru* v. *Johnson*, 720 F. Supp. 810, 812-814 (C.D. Cal. 1989) (same by Peru).

(1885). If the applicable state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (per curiam); see *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Otherwise, a federal court must "consider all of the available legal sources" to predict "how the state's highest court would answer the open questions." 19 Wright & Miller § 4507, at 178-179 (3d ed. 2016); see *Salve Regina Coll.*, 499 U.S. at 227.

In deciding questions of state law, the views of the State as expressed by its attorney general are "entitled to weight." 19 Wright & Miller § 4507, at 157-158; see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 n.30 (1997) (citing with approval an opinion concluding that the "reasoned opinion of [a] State Attorney General should be accorded respectful consideration"). This Court has made clear, however, that those views are not entitled to "controlling weight." *Stenberg* v. *Carhart*, 530 U.S. 914, 940 (2000); see, *e.g.*, *Virginia* v. *American Booksellers Ass'n.*, 484 U.S. 383, 395 (1988). The court of appeals gave no sound reason for requiring that federal courts give greater weight to the views of foreign governments.

3. This Court's decision in* Pink *does not support the court of appeals' rule of binding deference

The court of appeals believed that its rigid approach was compelled by this Court's pre-Rule 44.1 decision in *Pink*. Pet. App. 20a, 22a-23a. That is not correct. *Pink* arose out of an action brought by the United States to recover assets of the U.S. branch of a Russian insurance company that had been nationalized in 1918 after the Russian revolution. 315 U.S. at 210. In 1933, the government of the Soviet Union assigned the nationalized assets to the United States. *Id.* at 211. The disposition

of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree had reached the assets of the Russian insurance company located in the United States, or instead had been limited to property in Russia. *Id.* at 213-215, 217.

To support its position that the nationalization decree had reached all of the company's assets, the United States obtained an "official declaration by the Commissariat for Justice" of the Russian Socialist Federal Soviet Republic. *Pink*, 315 U.S. at 218. The declaration certified that the decree had reached "the funds and property of former insurance companies * * * irrespective of whether it was situated within the territorial limits of [Russia] or abroad." *Id.* at 220 (citation omitted). This Court held that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid.* "That being true," the Court concluded that the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

This Court's treatment of the declaration as conclusive was thus premised on an independent finding about the Commissariat's authority within the Soviet legal system. *Pink*, 315 U.S. at 220. The declaration was also obtained by the United States, through official "diplomatic channels." *Id.* at 218. The Commissariat's declaration was thus in some respects akin to a state supreme court's answer to a question of state law certified by a federal court. Cf. *Arizonans for Official English*, 520 U.S. at 76-77. There was apparently no indication that the declaration was incomplete or inconsistent with the Soviet Union's past statements, and the Court emphasized that the declaration was consistent with expert evidence that "gave great credence to [the] position"

that the nationalization decree reached property located abroad. *Pink*, 315 U.S. at 218. The Court's statement that the Commissariat's declaration was "conclusive" under those unusual circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

4. Considerations of reciprocity and comity do not support the court of appeals' rule of binding deference

The court of appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. That concern for reciprocity was sound, but it does not support the court's approach. In fact, the opposite is true.

When the United States litigates questions of U.S. law in foreign tribunals, it expects that the views submitted on its behalf will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the United States historically has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant material.[6] And although other nations' approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight.

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[6] Respondents assert (Supp. Br. 7-8) that the United States sought a greater degree of deference in a 2002 submission to a WTO panel. In fact, that submission acknowledged that "the Panel is not bound to accept the interpretation [of U.S. law] presented by the United States." Second Written Submission of the United States of America, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 ¶ 11 (Mar. 8, 2002).

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147, 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 107, 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice that is inconsistent with the court of appeals' approach, and they confirm that the court's rule of binding deference is not supported by considerations of international comity.

D. This Court Should Vacate The Decision Below And Remand The Case To Allow The Court Of Appeals To Apply The Correct Legal Standard

Because the court of appeals concluded that the district court was bound to defer to the Ministry's amicus brief, the court did not consider the shortcomings that the district court had identified in the Ministry's submissions or the other aspects of "the district court's careful and thorough treatment of the evidence before it." Pet. App. 30a n.10. The question whether the dis-

trict court correctly interpreted Chinese law is not before this Court, and we do not take a position on it.[7] But the materials identified by the district court were, at minimum, relevant to the weight that the Ministry's submissions should receive and to the question whether Chinese law required respondents' conduct. This Court should therefore vacate the decision below and remand

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[7] Respondents are wrong in stating (Supp. Br. 6-7) that the United States "affirmed" their interpretation of Chinese law in proceedings before the WTO. Those proceedings involved a different record and other commodities, not vitamin C. See First Written Submission of the United States of America, *China—Measures Related to the Exportation of Various Raw Materials*, DS394, DS395, DS398 ¶ 4 (June 1, 2010). Based on China's representations to the district court in this case—which were against China's interest in the WTO proceeding—the United States argued that export restraints adopted by a different China Chamber of Commerce were "attributable to China" for purposes of China's compliance with its WTO obligations. *Id.* ¶ 208. But in addition to involving different commodities and a different record, the WTO proceeding was governed by a different legal standard. This litigation has focused on the question whether Chinese law *required* respondents to fix the prices and output of vitamin C exports. In contrast, as the WTO panel explained, "[p]rivate actions" have been "found to be 'attributable' to a government, and thus subject to challenge [in WTO proceedings], where there is 'some governmental connection to or endorsement of those actions.'" World Trade Organization, *China—Measures Related to the Exportation of Various Raw Materials: Reports of the Panel*, WT/DS394/R, WT/DS395/R, WT/DS398/R ¶ 7.1004 (July 5, 2011) (citation omitted). That standard may be satisfied even where a nation's law does not *require* the relevant private conduct.

to allow the court of appeals to consider that question under the correct legal standard.[8]

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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[8] The court of appeals analyzed Chinese law, and gave controlling weight to the Ministry's characterization of that law, in the course of adjudicating (and sustaining) respondents' comity defense. As we explained at the petition stage (Br. 20), the court's comity analysis was erroneous in other respects as well. For example, the court gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its laws. Pet. App. 34a-35a. Conversely, the court gave too much weight to China's objections to this suit. *Id.* at 35a. Unlike a statement from the Executive Branch of the U.S. government, a foreign sovereign's objection to a suit does not, in itself, necessarily indicate that the case will harm U.S. foreign relations.

No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

AAI submits this brief to inform the Court of the serious adverse implications for antitrust enforcement and U.S. consumers if the Court follows the Second Circuit's rule of affording conclusive deference to a foreign government's statement that its laws compelled price fixing of exports to the United States.

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[1] All parties have provided written consent or blanket consent for the filing of this brief. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Advisory Board or their law firms represent petitioners, but they played no role in AAI's deliberations with respect to filing of the brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this antitrust class action U.S. purchasers allege that Chinese companies fixed the price and limited the supply of vitamin C exported to the United States and elsewhere. The Ministry of Commerce of the People's Republic of China ("MOFCOM" or "Ministry") appeared as amicus curiae in support of defendants' motion to dismiss and sought to explain that the price fixing of vitamin C exports was compelled by Chinese law and therefore dismissal was mandated by the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity. Pet. App. 189a. The government "regulation" of vitamin C did not purport to apply to Chinese domestic sales.

The district court refused to dismiss the case, finding sufficient contradictory evidence of compulsion to warrant further factual development. Pet. App. 186a. Another district judge ruled against the defendants on summary judgment and concluded that Chinese law did not compel defendants to fix prices or restrict output. *Id.* at 56a. Moreover, the court found, to the extent Chinese law compelled any price fixing, the companies were only directed to establish minimum prices to avoid international dumping violations, and hence agreements to engage in supracompetitive pricing or to restrict output would go beyond any defense based on compulsion. *Id.* at 106a, 139a-142a.

A jury found unlawful price fixing and awarded $54.1 million in damages before trebling. Pet. App.

276a-279a. In its special verdict, the jury found that defendants had failed to prove they were "actually compelled" to fix prices or limit output by the Chinese government. *Id.* at 278a. On appeal, the Second Circuit reversed the judgment and held that the district court should have granted defendants' motion to dismiss in the first instance under principles of international comity. *Id.* at 3a. It concluded there was a "true conflict" between U.S. and Chinese law based on statements in MOFCOM's brief, to which the court held it was "bound to defer." *Id.* at 25a, 33a. The court emphasized that "deference in this case is particularly important because of the unique and complex nature of the Chinese . . . economic-regulatory system" and "ambiguity surrounding China's laws." *Id.* at 29a.

The Second Circuit recognized that, in considering the weight to be given a foreign government's statement that "it has compelled an action that results in the violation of U.S. antitrust laws," the court must "balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders." Pet. App. 3a. The court found "China's strong interest in its protectionist economic policies . . . outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law." *Id.* at 37a (internal quotation marks omitted).

As the Solicitor General observed, the court "gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its antitrust

laws." U.S. Cert. Amicus Br. 20. "Conversely, the court gave too much weight to China's objections to this suit." *Id.* Indeed, it is not clear why comity demands that *any* deference be given to a foreign government's sheltering of a protectionist export cartel that harms U.S. consumers.

In any event, a rule requiring conclusive deference[2] to a foreign government's statement that its laws required fixing the price of exports would weaken the standard of proof for establishing the strict requirements of a compulsion defense or a "true conflict." The effect would be to substantially impair antitrust enforcement and impose significant costs on U.S. consumers.

Strict compliance with the requirements for proving compulsion or a "true conflict" is dictated by the Sherman Act's explicit prohibition of agreements restraining "trade or commerce with foreign nations." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273c1, at 362 (4th ed. 2013) (noting that this language is borrowed from the Constitution's Foreign Commerce Clause). It is also consistent with international antitrust norms. A rule of conclusive deference

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[2] We use the term "conclusive deference" to refer to the Second Circuit's standard whereby courts are obliged as a matter of law to defer to the foreign government's statement if it is reasonable on its face, without weighing other relevant evidence. *See* U.S. Cert. Amicus Br. 9-10 (court's inquiry limited "to the four corners of the [foreign government's] brief and the sources cited therein"); Pet. Br. 23 ("legal standard . . . turned on the bare fact of the Ministry's appearance in the litigation.").

would effectively lower those strict standards by making it easier to prove compulsion or conflict when either or both may be dubious.

Moreover, ambiguity and a lack of transparency in the exporting country's "regulatory" regime should count against deferring to the government's post hoc statement that it required its companies to cartelize export trade. Protectionist export cartels are condemned internationally. It follows that a foreign government's claim to have mandated such a cartel is less credible when it has failed to do so clearly and forthrightly.

Finally, it would be particularly unwise to lower the standard of proving compulsion or conflict at a time when we need more, not less, deterrence of international cartels. International cartels cost American consumers billions of dollars and continue to proliferate despite stepped up enforcement in the U.S. and around the world.

ARGUMENT

A CONCLUSIVE DEFERENCE STANDARD WOULD IMPAIR ANTITRUST ENFORCEMENT AND HARM AMERICAN CONSUMERS

"Should China be able to immunize its firms from US antitrust law by saying in court: I ordered them to do it?" Eleanor M. Fox & Daniel A. Crane, *Global Issues in Antitrust and Competition Law* 55 (2d ed. 2017). To be sure, the answer this Court gives should afford "the same respect and treatment that we would

expect our government to receive in comparable matters before a foreign court." Pet. App. 26a. But no principle of comity, including reciprocity, justifies giving conclusive deference to a foreign government's post hoc statement that its laws compelled price fixing. *See* U.S. Cert. Amicus Br. 11 (Department of Justice expects its characterizations of U.S. law will be accepted when "accurate and well-supported" and does not expect foreign courts to be precluded "from considering other relevant material").

The Second Circuit's conclusive deference standard obviously has implications that go well beyond antitrust cases. But the fact that such a standard of deference has important adverse implications for antitrust enforcement and protecting U.S. consumers from foreign export cartels should weigh heavily against adopting it. Whether the rubric is the foreign sovereign compulsion doctrine or the "true conflict" required by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), a conclusive deference standard makes it too easy to exempt international price-fixing cartels from U.S. law.

A. Strict Compliance with the Requirements of a Compulsion Defense or a "True Conflict" Is Required by the Sherman Act and Is Consistent with International Antitrust Norms

The requirements of a foreign sovereign compulsion defense are strict. *See* Herbert Hovenkamp, *Federal Antitrust Policy* 1030 (5th ed. 2016) ("courts have

construed the doctrine rather strictly").[3] As the U.S. antitrust enforcement agencies have pointed out, "the scope of the defense" is "limited" and does not apply unless "a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for International Enforcement and Cooperation* § 4.1, at 33 (2017) (hereinafter *Int'l Guidelines*).

Assuming, *arguendo*, that a court may abstain from exercising jurisdiction under principles of international comity when the exacting standard for the foreign sovereign compulsion defense is not met,[4] this

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[3] The compulsion doctrine has been described as a "corollary to the act of state doctrine." *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976). The rationale is that, "'[w]hen a nation compels a trade practice, firms there have no choice but to obey,'" and thus "'[a]cts of business become effectively acts of the sovereign.'" *Id.* (quoting *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970)) (first alteration in original); *see* Areeda & Hovenkamp ¶ 274c, at 400. But the foreign sovereign compulsion defense is limited because otherwise it "would permit foreign governments, operating perhaps at the instigation of private parties, to carve out large exceptions to the application of antitrust to American foreign and even domestic commerce." 1 Spencer Weber Waller & Andre Fiebig, *Antitrust and American Business Abroad* § 9:23, at 9-83-84 (4th ed. 2017).

[4] This Court declined to grant certiorari on the question whether comity provides an independent basis upon which courts may assert discretionary authority to abstain from exercising Sherman Act jurisdiction. At a minimum, as the Solicitor General has pointed out, "Comity-based dismissals should be rare, because Congress unambiguously intended the Sherman Act to reach for-

Court still requires a defendant to establish a "true conflict" between the laws of a foreign state and the antitrust laws. *Hartford Fire*, 509 U.S. at 798. That means "compliance with the laws of both countries [must have been] impossible." *Id.* at 799; *Int'l Guidelines* § 4.1, at 29 ("no conflict of law exists if a person . . . can comply with both"); *see* Pet. App. 16a-18a (court of appeals assumed, but did not decide, that a true conflict is required).[5]

The necessity for strict compliance with the requirements of the foreign sovereign compulsion defense or a "true conflict" not only reflects the wide scope of Sherman Act jurisdiction and our national policy favoring competition, but it also is consistent with the worldwide trend to favor open markets and punish price fixing. "As more jurisdictions have adopted and enforce antitrust laws that are compatible with those of the United States, it has become increasingly common that no conflict exists between U.S. antitrust enforcement interests and the laws or policies of a foreign sovereign." *Int'l Guidelines* § 4.1, at 28-29; *id.* at 28 ("conflicts of law are rare"). Indeed,

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eign conduct and because federal courts 'have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.'" U.S. Cert. Amicus Br. 19 (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990)); *see also* Areeda & Hovenkamp ¶ 273c1, at 367 ("[T]o the extent the antitrust laws represent the *public* economic policy of the United States, there may be little room for considerations of comity at all.").

[5] While adopting a comity balancing test, the Second Circuit recognized that a true conflict is a necessary but not sufficient condition for satisfying the test. Other comity factors would still have to be considered. *See* Pet. App. 17a.

"over 130 jurisdictions have enacted antitrust laws as a means to ensure open and free markets, promote consumer welfare, and prevent conduct that impedes competition." *Id.* § 1, at 2. The proliferation of antitrust regimes around the world has been described by scholars as "astonishing." *E.g.*, William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 Law & Contemp. Probs. 85, 86 (2016).[6]

Among the countries to adopt robust antitrust laws is China, which enacted its Anti-Monopoly Law in 2007. Even before then, "[i]mportant laws and administrative regulations involving anti-monopoly issues were adopted in the 1990s" in pursuit of establishing a "socialist market economy." Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust L.J. 73, 74 (2008); *see also* World Trade Org., Report of the Working Party on the Accession of China ¶ 65, at 12, WT/ACC/CHN/49 (Oct. 1, 2001) (hereinafter 2001 WTO Report) (Chinese government represented that it "encouraged fair competition and was against acts of unfair competition of all kinds").

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[6] The world has changed dramatically since the mid-1980s when the Justice Department offered an arguably more deferential standard toward foreign government statements concerning compulsion. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 18, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (No. 83-2004), 1985 WL 669667 (filed June 17, 1985) ("United States' trading partners often manage their domestic economic systems and international affairs in ways that differ from ours" and "sometimes cartelize important segments of their economies").

Price fixing in particular is universally condemned and increasingly subject to harsh penalties around the globe. *See* DLA Piper, Cartel Enforcement Global Review–June 2017. To be sure, government price regulation of some markets is not uncommon in the United States and elsewhere. However, it is a basic principle in the United States that a state may not "simply authorize[] price setting and enforce[] the prices established by private parties." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("a state does not give immunity to those who violate the [antitrust law] by authorizing them to violate it, or by declaring that their action is lawful").

A similar principle against delegating "regulatory" authority to companies to fix prices applies in many countries. *See, e.g.*, Org. for Econ. Co-operation and Dev., Directorate for Fin. & Ent. Affairs Comp. Comm., *The Regulated Conduct Defence* at 38, DAF/COMP(2011)3 (Sep. 1, 2011) ("regulated conduct defense" applies "only restrictively" and does not permit "private actors to determine when marketplace outcomes are unacceptable or not"). Moreover, protectionist, state-sponsored export cartels are afforded little respect among the community of nations. *See, e.g.*, Org. for Econ. Co-operation and Dev., *OECD Business and Finance Outlook 2017* § 4.5, at 155-57 (2017) (calling for "elimination of explicit export cartel exemptions in competition laws," competition authorities "sharing information and collaborating in investigations" of export cartels, and "positive comity" whereby "exporting competition authorities alert[] importing

country authorities about potential harmful export cartel conduct").[7]

B. Conclusive Deference to a Foreign Government's Contention that Its Laws Compelled Price Fixing Undermines the Strict Requirements for Proving a Compulsion Defense or a "True Conflict"

Giving conclusive deference to a foreign government's post hoc statement that its laws compelled price fixing necessarily weakens antitrust enforcement by making it easier to prove a compulsion defense or "true conflict" when the foreign law is unclear. Under a conclusive deference standard, courts would be unable to look behind such a statement even when a plaintiff offers good reason to do so. *See* U.S. Cert. Amicus Br. 9-10. A foreign government's statement may be less accurate or persuasive than other inter-

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[7] Even the United States has certain protectionist exemptions to the Sherman Act, such as the Webb-Pomerene Act of 1918 and the Export Trading Company Act of 1982, which exempt export cartels that meet certain requirements. *See* 15 U.S.C. §§ 61 *et seq.*; 15 U.S.C. §§ 4001 *et seq.* Importantly, however, the United States recognizes that exemption from U.S. antitrust laws under the Webb-Pomerene Act does not "provide any immunity from prosecution under foreign antitrust laws." *Int'l Guidelines* § 2.8, at 12 & n.55 (noting foreign actions brought against Webb-Pomerene cartels for violating foreign antitrust laws). Even specific authorization by the Secretary of Commerce under the Export Trading Company Act "does not constitute, explicitly or implicitly, an endorsement or opinion . . . concerning the legality of such business plans under the laws of any foreign country" nor "insulate conduct from investigation or enforcement by a foreign antitrust authority." *Id.* § 2.9, at 14.

pretations. And the risk that a country will manufacture such a statement to immunize its nationals from U.S. antitrust law seems ever present. The risk may be particularly pronounced when a foreign government has a proprietary interest at stake as the owner of an enterprise that is a defendant. *Cf. Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 834 (9th Cir. 2009) (less deference may be owed to agency interpretation where it has self-serving or pecuniary interest); *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1114 (2015) ("not question[ing] the good faith of state officers" to recognize "structural risk of market participants' confusing their own interests with the State's policy goals").

Moreover, conclusive deference distorts and undermines the limitations on a compulsion or true conflict defense. For example, the Second Circuit in this case, by affording conclusive deference to MOFCOM's statement that "the defendants were required by the laws of China to engage in the [challenged] conduct," Pet. App. 190a, elided three important questions about the scope of a compulsion or true conflict defense.

First, if a foreign sovereign sets a price floor, is a conspiracy to price in excess of that floor or to restrict output "compelled"? Without citing any authority, the Second Circuit answered yes, and hence evidence that suggested defendants "in fact charged prices in excess of those mandated," and that their "specific conduct was not compelled," was irrelevant. Pet. App. 32a, 33a. But the answer is obviously no under the compulsion doctrine. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) (private

foreign subsidiary serving as agent of Canadian Government's Metals Controller was not "compelled" where it used import-control authority to exclude rival alloy in furtherance of a conspiracy to monopolize U.S. market); *see Int'l Guidelines* § 4.2.2, at 33, n.123 ("Discretionary conduct is . . . outside the protections afforded by this defense." (citing *Continental Ore*)); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 315 (3d Cir. 1983) (American firms' challenge to Japanese competitors' alleged conspiracy to engage in predatory pricing in the United States was not "compelled" insofar as agreement mandated by the Japanese government involved higher prices), *rev'd on other grounds*, *Matsushita*, 475 U.S. 574.

Nor would a true conflict exist if defendants could comply with both a Chinese mandate to agree to a price floor to avoid dumping charges and a requirement of the Sherman Act not to conspire to charge supracompetitive prices or restrict output. Such a mandate certainly should not be "construed as an implied repeal of all antitrust regulation" in the vitamin C export market. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 217 (1966); *see United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 509-10 (4th Cir. 2005) (exemption for certain segment of through-transportation market under Shipping Act does not extend to entire through-transportation market); *In re Blue Cross Blue Shield Antitrust Litig.*, 238 F.Supp.3d 1313, 1328 (N.D. Ala. 2017) (exemption for insurance ratemaking activity under filed-rate doctrine does not extend to rates in excess of those that were filed).

Second, is conduct "compelled" if the foreign law is not enforced and may be safely ignored? The Second Circuit simply assumed as much insofar as evidence of non-enforcement was not "relevant to the . . . regime's legal mandate." Pet. App. 32a; *see also id.* at 31a (irrelevant whether defendants "complied with . . . mandate"). However, the compulsion defense would not apply if the mandate is not enforced. *See Int'l Guidelines* § 4.2.2, at 33. And non-enforcement would suggest the absence of a true conflict because compliance with U.S. law would not be "impossible."

Third, if a foreign sovereign simply directs private companies to engage in price fixing, without mandating any particular prices or providing regulatory supervision, is the setting of supracompetitive prices "compelled"? The Second Circuit assumed the answer is yes,[8] but the compulsion defense or a true conflict requires more. *See Timberlane*, 549 F.2d at 607 (fact that the government "'may, as a practical matter, approve of the effects of . . . private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate'" (quoting *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962)); *see also Int'l Guidelines* § 4.2.2, at

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[8] The Second Circuit accepted that the "Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed upon price as the minimum export price." Pet. App. 28a. The Ministry had acknowledged that it "did not decide what specific prices should be. Instead, this governmental function was delegated to the market participants and the Chamber." *Id.* at 207a.

32-33 ("[T]hat conduct may be lawful, approved or encouraged in a foreign jurisdiction does not, in and of itself, bar application of the U.S. antitrust laws—even when the foreign jurisdiction has a strong policy in favor of the conduct in question." (citing *Hartford Fire*)).

Such conduct certainly would not be immunized under the state-action doctrine, which addresses conflicts between the Sherman Act and state law. *See* Areeda & Hovenkamp ¶ 274c, at 401 (discussing analogy in context of conflict with foreign law). The Sherman Act does not permit "unsupervised delegations to active market participants" to "regulate their own markets." *Dental Exam'rs*, 135 S. Ct. at 1111; *see* Areeda & Hovenkamp ¶ 226a, at 179 (*Parker* does not allow states to "authorize (or even compel) private parties to displace market competition with their own unsupervised preferences").

In short, conclusively deferring to a foreign sovereign's statement about compulsion can lead a court (as it did the Second Circuit) to avoid delving into the details and actual facts of implementation that may call into question whether a price-fixing regime involved merely a "gauzy cloak" of government involvement, *Midcal*, 445 U.S. at 106, or whether it satisfied the demanding requirements of a compulsion defense or comity abstention based on a "true conflict."

C. The Lack of Transparency of a Foreign Government's Law is Grounds for Less, Not More, Deference

The Second Circuit thought the fact that "'Chinese law is not as transparent as that of the United States'" made it particularly important to defer to the Ministry's interpretation. Pet. App. 29a (quoting district court). But the opposite is true. A lack of transparency should be grounds to call into question a post hoc statement that price fixing of exports has been compelled.

To facilitate its entry into the WTO, China made representations to the world trading body that it "gave up export administration" of vitamin C and many other products. JA 319; *see also* 2001 WTO Report ¶¶ 50, 56, 62, at 10-12 (China represented that it had sharply reduced the number of products subject to government price control—identifying those products in an annex—and that "price controls would not be used for purposes of affording protection to domestic industries"). Then, in this case, MOFCOM claimed to have directed its exporters to fix prices and restrict the supply of vitamin C. The district court concluded that China's representations to the WTO "appear to contradict the Ministry's position in the instant litigation," which was a further reason not to defer to the Ministry's position. Pet. App. 120a-121a. More generally, the very fact that China's minimum export price system is "largely opaque" and "highly non-transparent,"

according to the U.S. Trade Representative,[9] is itself grounds for affording less deference. *Cf. Int'l Guidelines* § 4.2.2 n.124 (ambiguous statements regarding compulsion not given dispositive weight).

As in the state-action context, it is important that foreign sovereigns that mandate anticompetitive export restraints "accept political responsibility for actions they intend to undertake" in the worldwide trading arena. *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). A foreign government should "make clear that [it] is responsible for the price fixing it has sanctioned and undertaken to control." *Id.* at 633. Its failure to do so militates against affording conclusive deference to its post hoc statements.

D. Weakening Deterrence Is Unwise in an Era of Rampant International Cartels

International cartels are a scourge of the global economy. *Known* international cartels have been estimated to cost consumers around the globe more than

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[9] First Written Submission of the United States, China—Measures Related to the Exportation of Various Raw Materials 91, 100, WTO Nos. DS394, DS395, DS396 (June 1, 2010) (challenging export restraints involving products other than vitamin C based in part on submissions by MOFCOM in this case), https://ustr.gov/sites/default/files/uploads/ziptest/WTO Dispute/New_Folder/Pending/DS394.US_.Sub1_.fin_.pdf.

$1.5 trillion since 1990, with North American consumers paying more than $400 billion.[10] The Justice Department has prosecuted dozens of international cartels, obtaining fines of over $12 billion, and jail time for over 88 foreign nationals.[11] *See generally Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012) ("Foreign cartels . . . have often been the target of either governmental or private litigation.").

But despite stepped up U.S. and foreign anti-cartel enforcement, international cartels continue to proliferate. *See* Connor at 22-23 (75 discovered per year); Scott D. Hammond, Deputy Ass't Attorney General, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 1, 3 (Feb. 25, 2010) (50 DOJ investigations open at a time). Deterrence remains insufficient. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 429 (2012).

Conclusive deference, by making it easier to prove a foreign sovereign compulsion or "true conflict" defense, will only undercut deterrence, making cartels that harm U.S. consumers more likely. "The host

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[10] *See* John M. Connor, The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 at 1, 42 (Rev. 2d ed. 2016), https://ssrn.com/abstract=2821254.

[11] *See* U.S. Dep't of Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Jan. 17, 2018) https://www.justice.gov/atr/page/file/991706/download; Brent Snyder, Deputy Ass't Attorney General, Individual Accountability for Antitrust Crimes 8 (Feb. 19, 2016), https://www.justice.gov/opa/file/826721/download.

country for the cartel will often have no incentive to prosecute it" and "would logically be pleased to reap the economic rents from other countries . . . [that] their exporters collect." *Minn-Chem*, 683 F.3d at 860. The same incentive may lead foreign governments to lend their support to export cartels when challenged in U.S. courts. And even if such support is not forthcoming, deterrence is lessened if foreign firms *believe* that they can immunize their export cartels under U.S. law by obtaining a statement from their government that their conduct was compelled.

Foreign firms should expect instead that when they export their goods to the United States, they will be subject to the full effect of U.S. antitrust laws.

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In sum, a general rule of conclusive deference in the antitrust context imposes real costs on antitrust enforcement and U.S. consumers. These effects should weigh heavily against adopting such a rule.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including with respect to its international activities.

The Chamber's members and the broader business community have a substantial interest in the level of judicial deference U.S. courts give to a sovereign's interpretation of its law – whether that sovereign is domestic or foreign. The Chamber has repeatedly urged this Court to reconsider, or at least substantially cabin, *Seminole Rock*[2] (or *Auer*)[3] deference granted to a federal agency's interpretation of its own regulations. *See, e.g.*, *Garco Construction, Inc. v. Sec'y of the Army*, 856 F.3d 938 (Fed. Cir. 2017), *petition for cert. filed*, (U.S. Aug. 7, 2017) (No. 17-225). And the Chamber, as either a plaintiff, petitioner or an *amicus*

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and have consented to this filing.

[2] *See Bowles v. Seminole Rock & Sand Corp.*, 325 U.S. 410 (1945).

[3] *See Auer v. Robbins*, 519 U.S. 452 (1997).

curiae, has frequently urged American courts to scrutinize, rather than reflexively defer to, federal agencies' capacious interpretations of purportedly ambiguous statutory text. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

This case, which presents the doctrine of international comity, is a species of the genus. Although the issue here, unlike in the *Auer*[4] and *Chevron*[5] contexts, arises in an antitrust dispute between private parties and concerns a particular foreign sovereign's interpretation of its law, the Chamber is of the view that free enterprise does not benefit from an uncritical and reflexive deference by the courts to a sovereign regulator's interpretation of its own laws.

This may be particularly so where a foreign state does not operate with regulatory impartiality regarding state-owned enterprises and private actors, and regularly provides "informal" or "non-binding" mandates that can influence the behavior of state-owned and state-favored private enterprises, to the detriment of U.S. business. This Court should be circumspect lest deference to a foreign country's litigating positions regarding the scope of its laws become carte blanche to justify violations of U.S. law, for example by creating a price cartel in pursuit of an industrial policy objective.

SUMMARY OF ARGUMENT

This Court has long held that the doctrine of international comity requires a balancing of "international duty and convenience" with "the rights of its own

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[4] *See Auer v. Robbins*, 519 U.S. 452 (1997).

[5] *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). In seeking affirmance of the Second Circuit's decision below, Respondents propose a standard of deference to foreign states that would distort, if not eliminate, this balancing test. They favor a "clear rule of conclusive deference" whenever a foreign sovereign "formally" appears with an interpretation of its domestic law that is not "obviously unreasonable."[6] While the views of a foreign state are entitled to substantial deference, affirmance of the Second Circuit's test would significantly distort the traditional weighing of interests under the doctrine of comity. The purpose of this *amicus curiae* brief is to note the potential ramifications of Respondents' reconception of the doctrine of comity on other areas of U.S. law.

ARGUMENT

I. The Doctrine of International Comity in U.S. Law

International comity is a multifarious concept.[7] The term has been deployed by courts and commentators to reference both the *deference* afforded to foreign sovereigns and the *doctrine* for determining the level

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[6] Brief in Opposition at 20, 24.

[7] *See generally* Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 47-53 (2010) (describing three primary forms of modern U.S. comity analyses); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078-79 (2015) (surveying U.S. legal applications of comity and proposing a similar tripartite interpretative taxonomy).

of such deference.[8] This submission concerns international comity in its second sense.

The doctrine of comity exists as a tool for U.S. judges to mediate the legal issues that arise when a particular case implicates the sovereign interests of a foreign state. The concept of comity traces to conflict-of-laws jurisprudence of the late Middle Ages.[9] Seventeenth-century Dutch academic Ulrich Huber later opined that comity calls on a state to recognize and enforce rights created by other states, provided that such recognition does not prejudice the state or its subjects.[10]

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[8] Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19, 27 (2008) ("[C]omity is offered [in *Hilton v. Guyot*] both as a rule for the enforcement of foreign judgments, and as an explanation for why foreign judgments should be enforced. In other words, comity is both a legal doctrine and also a justification for deferring to foreign judgments."); Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 13-14 (2010) ("[a] court may apply the laws of another country by virtue of comity" but comity also "serves as a judicial canon" and "jurisprudential concept"). *See also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 555 (1987); *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996).

[9] Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 391-92 (1919) (describing the recognition and enforcement of foreign court decisions "as a natural duty imposed by considerations of justice" in accordance with the Roman maxim *res judicata pro veritate accipitur*).

[10] ULRICH HUBER, DE JURE CIVITATIS, bk. 3, s. 4, c. 1, n. 42 (1694) ("Both should be enforced, on grounds of comity, for reasons of utility and convenience, unless it would cause prejudice to the state or to its citizens."). *See also* Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 378 (1919). As early as 1797, this Court acknowledged the doctrine of comity among nations by explicit reference to Huber's treatise. *See*

Relying on Huber, Justice Story wrote in his seminal monograph *Commentaries on the Conflict of Laws* that "there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, of that nation, which were subversive of their own morals, justice, or polity."[11]

In the United States, the doctrine of comity affects a host of judicial doctrines, from foreign sovereign immunity[12] and judicial abstention[13] to the presumption against extraterritoriality[14] and approaches to

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Emory v. Grenough, 3 U.S. 369 (1797) ("The following extract from Huberus was translated for, and read in, this cause . . . .").

[11] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 25 (4th ed. 1852).

[12] *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (characterizing foreign sovereign immunity as a "gesture of comity") (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)); *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (noting "risks to international comity" posed by expansive view of general jurisdiction).

[13] *See, e.g.*, *Royal & Sun All. Ins. Corp. of Can. v. Century Int'l Arms*, Inc., 466 F.3d 88, 92 (2d Cir. 2006) (applying "doctrine of international comity abstention" in deferring to parallel proceeding in foreign court); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1987) (concluding that factors favoring antisuit injunction for foreign parallel proceeding were "not sufficient to overcome the restraint and caution required by international comity").

[14] *See, e.g.*, *EEOC v. Arabian Am. Oil Corp.*, 499 U.S. 244, 248 (1991) (the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord") (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (noting that "principles of prescriptive comity" limit U.S. antitrust law).

transnational discovery.[15] Even the application of customary international law in U.S. courts implicates notions of international comity.[16]

Although the application of comity in a particular case may implicate several different issues, the framework for weighing those issues is well established. Per *Hilton v. Guyot*, U.S. courts must balance "international duty and convenience" against "the rights of its own citizens or of other persons who are under the protections of its laws." 159 U.S. 113, 163-64 (1895).[17] Both considerations must be weighed against each other to

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[15] *See, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 543–44 (1987) (noting that the "concept of international comity" requires "particularized analysis" for discovery requests *outside* of the United States for use in *domestic* courts); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004) ("comity and parity concerns may be important as touchstones" for discovery *inside* the United States for use in *foreign* courts). Other instantiations of international comity include conflict of laws, *see Bank of Augusta v. Earle*, 38 U.S. 519, 589 (1839) ("[T]he laws of one [country] will, by the comity of nations, be recognised and executed in another . . . ."); and the ability of foreign sovereigns to bring actions in U.S. courts *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964) ("Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States.").

[16] *Oetjen v. Central Leather Corp.*, 246 U.S. 297, 302-04 (1918) (noting that "principles of international law" apply in U.S. courts and rest "at last upon the highest considerations of international comity and expediency").

[17] *See also* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1, 8-9 (1991) (noting that *Hilton* "is the most commonly cited statement of comity in U.S. law"); *Oakey v. Bennett*, 52 U.S. 33 (1850) ("national comity does not require any government to give effect to such assignment, when it shall impair the remedies or lessen the securities of its own citizens").

properly account for the novel, sensitive, and difficult issues that often arise in cases involving transnational litigation.

This Court has applied *Hilton*'s balancing exercise for over a century to cases involving foreign legislative, executive, or judicial authorities.[18] This is seen in *United States v. Pink*, 315 U.S. 203 (1942), which Respondents cite in support of the Second Circuit's decision. Brief in Opp. at 24. In *Pink*, this Court delineated two questions: (i) whether the Russian decree at issue was *intended* by its drafters to have extraterritorial effect and (ii) whether the decree *should* be granted extraterritorial effect as a matter of U.S. law.[19] Although the *Pink* Court accepted the representations of the Soviet Government regarding the first inquiry, it exercised independent judgment in weighing the relevant interests at issue in respect of the second, including in particular the views of the Executive Branch. The Court found that the Russian

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[18] *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578-79 (1908) (noting that "international comity does not require the enforcement of judgments" that would prejudice the rights of local creditors); *Second Russian Ins. Corp. v. Miller*, 268 U.S. 552, 561 (1925) (finding that "adoption of foreign law by comity" would be "much beyond its limits as at present defined" and finding "no basis for the contention that the principle of comity would require" the same); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (requiring courts to "take care to demonstrate due respect for . . . any sovereign interest expressed by a foreign state" but declining to "articulate specific rules to guide this delicate task of adjudication").

[19] *Pink*, 315 U.S. at 221 (1942) ("We hold that so far as its intended effect is concerned the Russian decree embraced the New York assets of the First Russian Insurance Co. . . . The question of whether the decree should be given extraterritorial effect is of course a distinct matter.").

decree was a facet of a larger "transaction[] resulting in an international compact between the two governments," which established diplomatic relations and settled liability claims between U.S. and Soviet nationals. *Pink*, 315 U.S. at 223. The Court concluded that the decree should be granted extraterritorial effect because "[i]t was the judgment of the [U.S.] political department that full recognition of the Soviet government required settlement of all outstanding problems including the claims of our nationals," and "[w]e would usurp the executive function if we held that that decision was not final and conclusive in the courts." *Id.* at 230. The *Pink* Court thus assessed all relevant circumstances before recognizing the extraterritorial effect of the Russian decree. Contrary to Respondents' assertion, the Soviet Government's interpretation of its decree was an element, but not conclusive, of the question presented in *Pink*.

II. Respondents' Proposed Test Would Materially Alter the Doctrine of International Comity

The Second Circuit's decision cites *Hilton v. Guyot* but then applies that decision in a way that effectively reduces its balancing test to a vanishing point. Pet. App. 13a. In pressing for affirmance in this Court, Respondents propose a test under which a foreign state's interpretation of its own law is given "conclusive" deference. Ascribing such weight to a single consideration is irreconcilable with the holistic balancing found in this Court's jurisprudence. It is settled law that a U.S. court should give substantial weight to the statement of a foreign government concerning its

own law.[20] But, as the United States argued at the certiorari stage, this should not preclude a U.S. court from considering "all relevant circumstances," including the "statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating and contradictory evidence." Invitation Brief for the United States as *Amicus Curiae* at 7-8.

Respondents argue that their position "allows courts to more capably and credibly balance the competing sovereign interests at stake." Brief in Opp. at 24. But under Respondents' "clear rule of conclusive deference," the foreign state's position would have a multiplier effect on the remainder of the comity analysis, which, when coupled with the substantial deference already afforded foreign sovereigns, could bring the traditional balancing under the doctrine of comity into disequilibrium.

This would be a clear departure from the articulation of comity in *Hilton* and its progeny, and would materially restrict the scope of substantive review that U.S. courts typically exercise when applying the doctrine of comity.

As elaborated in Part III *infra*, it is not uncommon for a foreign state to have a direct or indirect interest in the outcome of U.S. litigation. In such cases, the

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[20] *See, e.g.*, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. of S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987) (evoking "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); *United States v. McNab*, 324 F.3d 1266, 1241 (11th Cir. 2003) (noting that "[a]mong the most logical sources for [a] court to look to in its determination of foreign law are the [relevant] foreign officials").

post litem motam statement of the foreign sovereign should be measured against "any" other "relevant material or source," as provided in Federal Rule of Civil Procedure 44.1. There is no inconsistency between affording deference to a foreign sovereign and considering the totality of the circumstances – a representation by a foreign state does not render other materials and sources immaterial.[21]

In particular, Respondents' proposed test would give undue weight to the *method* by which a foreign sovereign expresses its views, with states receiving special, or even dispositive, deference when they "formally appear" in a pending U.S. case. Brief in Opp. at 24. Although a foreign state's "direct participation" signals the importance of that case to that state, the form of the state's participation should not negate full consideration of all relevant factors. The views of a foreign state should always be taken into account, but the particular *means* by which those views are expressed should not alter the *substantive* balancing of the array of considerations bearing upon a particular transnational dispute. Indeed, such a rule could

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[21] The weight afforded a particular foreign state's submission might include consideration of the reliability of the application of the rule of law in that jurisdiction. For example, only 97 of 215 countries and territories enjoyed a positive score (on a scale of -2.5 to 2.5) in the 2016 World Bank governance indicator for "rule of law." *See* WORLD BANK GROUP, WORLDWIDE GOVERNANCE INDICATORS: 1996-2016 (2018), http://info.worldbank.org/governance/wgi/index.aspx#home. According to the World Justice Project's 2017 Rule of Law Index, 75 of 113 countries score below 0.60 (on a 1.00 scale) in terms of their provision of "civil justice," with 42 of those countries scoring below 0.50. *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX: 2017-2018 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017 18_Online-Edition_0.pdf.

skew the application of the doctrine of comity in future cases, because the number of "formal representations" by foreign states would only increase if they received "conclusive deference." This could give foreign sovereigns undue influence over adversarial proceedings in which they have an interest.

III. U.S. Courts Have Applied the Comity Balancing Test in a Diverse Array of Cases Involving Foreign Law

Although presented in the specific context of whether there is a "true conflict" between U.S. and foreign law on competition, the case at hand presents the broader question of whether U.S. courts under the doctrine of international comity must afford "conclusive deference whenever a foreign sovereign formally appears with an interpretation of its own domestic law that is not obviously unreasonable."[22] Respondents' proposed test would, if accepted, threaten to upend other areas of U.S. law where the doctrine of comity obtains. As the cases below illustrate, the holistic balancing found in these other areas of U.S. law would be materially altered under Respondents' reconception of the doctrine of comity.

A. Cases Involving Questions of Foreign Sovereign Immunity

The doctrine of comity is manifested in U.S. jurisprudence on the liability of foreign states under the exceptions enumerated in the Foreign Sovereign Immunities Act (FSIA). *See* 28 U.S.C. § 1605 *et seq.*

Under the FSIA, U.S. courts may exercise jurisdiction over foreign sovereigns and their agencies and

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[22] Brief in Opposition at 24.

instrumentalities with respect to certain commercial activity. 28 U.S.C. § 1605(a)(2). In determining whether a foreign entity should be considered a state instrumentality, U.S. courts consider – but do not conclusively defer to – foreign laws bearing upon its legal status.

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*) concerned a letter of credit that Banco Para el Comercio Exterior de Cuba (Bancec), a Cuban bank, received in 1960 from Citibank, a U.S. banking and financial services company. 462 U.S. 611, 614 (1983).[23] Days after Bancec sought to collect on this letter, all of Citibank's assets were seized and nationalized without compensation by the Cuban Government. *Id.* When Bancec sought to enforce the letter of credit in U.S. district court, Citibank counterclaimed to obtain a set off reflecting the value of its nationalized assets, for which it had not received any compensation. *Id.* at 614-15. This counterclaim was predicated on the assertion that Bancec was the *alter ego* of the Cuban Government, and was thus liable to provide compensation for the expropriation. *Id.* at 617-19.

As the *Bancec* Court acknowledged, "the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation." 462 U.S. at 621. Bancec was established under Cuban law as "an official autonomous credit institution for foreign trade with full juridical capacity of its own." *Id.* at 613 (quoting Law No. 793, Art. 1 (1960) (Cuba)). During the district court proceedings, a former Cuban government attorney confirmed that "under Cuban

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[23] At the time of the expropriation, Citibank was named First National City Bank. *See Bancec*, 426 U.S. at 613.

law Bancec had independent legal status." *Id.* at 616, fn. 3.

The *Bancec* Court nevertheless declined to defer to Cuban law. As Bancec had effectively been subsumed by the Cuban Ministry of Trade, any award in Bancec's favor would accrue to the Cuban Government. 462 U.S. at 615-16, 630-32. Applying Cuban law would thus have allowed "the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets." *Id.* at 632. The Court observed that "giv[ing] conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Id.* at 622.

The *Bancec* Court underlined that its decision was the result of its balancing of competing equities which "announce[d] no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." 462 U.S. at 633. Instead, it was "the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." *Id.* at 633-34.

If applied in the FSIA context, Respondents' position might establish the very "mechanical formula" that *Bancec* rejects, which could allow foreign States to "insulat[e] [themselves] from liability in foreign courts." *Bancec*, 462 U.S. at 622.

B. Enforcement of Foreign Arbitral Awards Under the New York Convention

The doctrine of international comity looms large in the jurisprudence of U.S. courts on whether to enforce foreign arbitral awards that have been set aside at the seat of arbitration by foreign courts applying their own domestic law.

The enforcement of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (New York Convention). The New York Convention is implemented in the United States by Chapter Two of the Federal Arbitration Act. 9 U.S.C. §§ 201-08. Article III of the New York Convention sets out the conditions under which U.S. courts are to "recognize arbitral awards as binding and enforce them." New York Convention, Art. III, 9 U.S.C. § 207. In particular, courts may refuse recognition and enforcement where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, Art. V(1)(e).

The New York Convention does not mandate that the court in which enforcement is sought defer to the decision of the court where the arbitration was seated; this is left to the discretion of the enforcement court. *See, e.g., Karaha Bodas Corp. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369 (5th Cir. 2003) ("As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past."). In exercising this discretion, U.S. courts "weigh[] notions of 'public policy' in determining whether to credit the judgment of a court in the primary State

vacating an arbitration award." *TermoRio S.A. E.S.P. v. Electranta S.P.* (*TermoRio*), 487 F.3d 928, 938 (D.C. Cir. 2007). This entails balancing the deference owed to the foreign judgment setting aside the arbitral award and the interests of the party seeking enforcement of the arbitral award. *Ackermann v. Levine* (*Ackermann*), 788 F.2d 830, 842 (2d Cir. 1986) (balancing (1) the *res judicata* of a foreign judgment and (2) concerns about fairness to litigants).

Consistent with the substantial deference afforded foreign sovereigns, arbitral awards set aside at the seat of arbitration are presumptively unenforceable. *See TermoRio*, 487 F.3d 928, 936 (D.C. Cir. 2007) ("an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made"). This presumption recently led the Second Circuit to revoke a decision enforcing an arbitral award after it was subsequently set aside by a court at the seat of arbitration. *Thai-Lao Lignite* (*Thailand*) *Corp., Ltd. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 182–89 (2d Cir. 2017).

In exceptional circumstances, however, U.S. courts will enforce an award that was set aside at the seat of arbitration, where deference to the foreign court's decision would be "repugnant to fundamental notions of what is decent and just." *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion* (*Pemex*), 832 F.3d 92, 106 (2d Cir. 2016) (quoting *Ackermann*, 788 F.2d 830, 837 (2d Cir. 1986) and *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)); *see also Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

Each case is assessed on its specific facts. In *Pemex*, for instance, the Eleventh Collegiate Court in Mexico set aside an arbitral award against an instrumentality of the Mexican Government on the ground that the instrumentality could not be compelled to arbitrate. In so holding, the Mexican court cited a Mexican law that had been enacted after the arbitration had commenced. 832 F.3d 92, 99 (2d Cir. 2016).

The Second Circuit refused to defer to the Mexican annulment. *First*, the Second Circuit held that deferring to the Mexican annulment of an arbitral would give effect to a "twelfth-hour invocation of sovereign immunity" that "shatters [the petitioner's] investment-backed expectation in contracting, thereby impairing one of the core aims of contract law." *Pemex*, 832 F.3d. at 108. *Second*, the Court opined that "[g]iving effect to the nullification would likewise impair the closely-related concept of avoiding retroactive application of laws." *Id.* *Third*, the Court held that "[t]he imperative of having cases heard – somewhere – is firmly embedded in legal doctrine," and recognizing the annulment would leave Petitioners without a "sure forum in which to bring its contract claims." *Id.* at 109. *Fourth*, recognizing the annulment would give effect to "a taking of private property without compensation," which "would be an unconstitutional taking" in the United States. *Id.* at 110.

Respondents' proposal for a "clear rule" in favor of a foreign sovereign's interpretation of its own law is difficult to reconcile with the discretion the New York Convention affords enforcement courts to recognize arbitral awards that have been set aside at the seat of arbitration.

C. Enforcement of Foreign Judgments in U.S. Courts

The doctrine of international comity is integrated into the jurisprudence of U.S. courts regarding the enforcement of foreign judgments. Generally, "a final judgment of a court of a foreign state . . . is entitled to recognition in courts in the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (1987). However, in the absence of specific treaty commitments, "[n]o sovereign is bound . . . to execute within his dominions a judgment rendered by the tribunals of another State." *Hilton v. Guyot*, 159 U.S. at 116. A decision to recognize a foreign judgment necessarily involves a balancing exercise, as it "depend[s] on a variety of circumstances which cannot be reduced to any certain rule." *Id.* at 164 (quoting STORY, COMMENTARIES ON THE CONFLICT OF LAWS at § 28).

Courts in the United States have declined to recognize foreign judgments in instances where the proceedings failed to provide basic due process or otherwise violated public policy.[24] For example, in

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[24] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987) (setting out grounds for non-enforcement of foreign judgments); *Hilton v. Guyot*, 159 U. S. 113, 167 (1895) ("Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice."); *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de CV*, 347 F.3d 589, 594 (5th Cir. 2003) ("Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice."); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 608-09 (S.D.N.Y. 2014) (denying enforcement where judgment was procured through fraud and corruption); *Manez Lopez v. Ford Motor Corp.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006)

Sanchez Osorio v. Dole Food Corp., 665 F. Supp. 2d 1307 (S.D. Fla. 2009; *aff'd sub nom Osorio v. Dow Chemical Corp.*, 635 F.3d 1277 (11th Cir. 2011)) (*Osorio*), the district court declined to enforce a judgment by a Nicaraguan trial court against several agricultural and chemical companies pursuant to Special Law 364, a Nicaraguan law specially regulating the procedures for lawsuits pertaining to compensation of persons injured by the pesticide DBCP. *Id.* at 1311-12. This judgment was part of a series of cases brought under Special Law 364, which collectively resulted in judgments of over US$2 billion. 665 F. Supp. 2d. at 1312.

The district court determined that Special Law 364 presented a number of concerns. Among other things, it established an irrefutable presumption that DBCP was the cause of plaintiffs' sterility. *Osorio*, 665 F. Supp. 2d at 1314 (citing Special Law 364, Art. 9), 1327 -29. It also provided the parties only eight days to submit evidence, evincing in the district court's view a "clear intent . . . to unfairly fast track these substantial and complex cases, and thereby deny DBCP defendants sufficient time to present an adequate defense." *Id.* at 1340.

In particular, the district court was presented with divergent conclusions from the Nicaraguan Supreme Court and the Nicaraguan trial court regarding the constitutionality of the jurisdictional provisions in Special Law 364. *Osorio*, 665 F. Supp. 2d at 1324-26. The district court noted that it "had broad discretion

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(refusing recognition of foreign judgment procured by fraud); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (generalized proof of systemic due process concerns sufficient to refuse recognition of foreign judgment).

to consider 'any relevant material or source, including testimony' in determining foreign law." *Id.* at 1322, 1326 (quoting Fed. R. Civ. P. 44.1). It thereby exercised its independent judgment to conclude that, under the Nicaraguan Supreme Court's decision, there was no jurisdiction over the judgment debtors. *Id.* at 1326.

The district court also denied enforcement of the Nicaraguan trial court's judgment on public policy grounds, as Special Law 364 was found to unfairly target "a narrowly defined group of foreign defendants and subject them to discriminatory provisions that d[id] not apply to domestic defendants[.]" *Osorio*, 665 F. Supp. 2d at 1336. The court found that this offended the general principle of equality before the law that is "basic to any definition of due process and fair play." *Id.* at 1341-42. In reaching its conclusions, the district court considered the totality of the circumstances, including contradictory interpretations of Nicaraguan law. *Id.*

Respondents' theory of conclusive deference to a foreign state's interpretation of its own laws is in tension with the decisions of U.S. courts refusing to recognize foreign judgments that offend minimal standards of due process or violate public policy.

D. Discovery Requests Made Under 28 U.S.C. § 1782

The doctrine of comity also finds expression in the discretion accorded U.S. district courts to grant discovery requests in aid of a foreign or international tribunal under 28 U.S.C. § 1782. District courts consider multiple factors when deciding whether to grant section 1782 discovery requests.

This Court's judgment in *Intel Corp. v. Advanced Micro Devices, Inc.* represents the clearest judicial statement on how district courts should approach section 1782 discovery requests. 542 U.S. 241, 252 (2004). It establishes a discretionary four-part test under which district courts consider a number of factors bearing upon whether to grant section 1782 discovery.[25]

One of the issues presented in *Intel* was whether section 1782 imposes a foreign-discoverability rule, which would prevent a U.S. court from ordering production of documents that the applicant could not obtain "if they were located in the foreign jurisdiction." 542 U.S. at 259-60. The *Intel* Court concluded that the documents need not be discoverable in the foreign jurisdiction, explaining that "[w]hile comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a)." *Id.* at 260-61.

Given the hortatory aim of section 1782 of "encouraging foreign countries by example to provide

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[25] *Intel*, 542 U.S. at 264-65 (noting that a district court's discretion as to whether to grant a section 1782 application should be guided by four factors: (1) whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the section 1782 request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States; (4) whether the request is unduly intrusive or burdensome).

similar assistance to [U.S.] courts,"[26] the *Intel* Court determined that the receptivity of the foreign court to the discovery provided by U.S. court could not dictate the inquiry. In particular the Court did not give conclusive weight to the *amicus curiae* brief of the European Commission, the putative beneficiary of the section 1782 application in that case, which opposed U.S. discovery on the ground that a "private complainant lacks any authority to obtain discovery of business secrets and commercial information" under European Union law. 542 U.S. at 272 (citing Brief for Commission of the European Communities as *Amicus Curiae* at 13, n. 15.).

The Second Circuit's understanding that comity requires "conclusive" deference to the formal view of a foreign sovereign sits uneasily with the *Intel* Court's determination that the non-discoverability of documents as a matter of foreign law does not control a district court's analysis as to whether discovery should be allowed under section 1782.

* * *

The doctrine of international comity requires substantial deference to the interests of foreign states along with consideration of the interests of the United States and those seeking the protection of its laws. The test applied by the Second Circuit below and advocated by Respondents in this Court threatens to upset this balance, with potentially undesirable consequences for other areas of U.S. law.

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[26] *Intel*, 542 U.S. at 252.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court reverse the judgment of the Second Circuit below.

Respectfully submitted,

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No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
Petitioners,
v.
HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief for China Chamber of International Commerce As Amicus in Support of Respondents

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QUESTION PRESENTED

Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive the interpretation or characterization of that law by the authoritative decision-maker in the foreign country at issue.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief for China Chamber of International Commerce As *Amicus* in Support of Respondents

INTEREST OF *AMICUS CURIAE*[1]

Amicus, China Chamber of International Commerce (CCOIC), is the China National Committee of the International Chamber of Commerce (ICC), and carries out relevant business worldwide with more than 130 country members of

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[1] The parties have consented to the filing of this *amicus* Brief. Respondents have filed a blanket consent. The consent of Petitioners has been received by email. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party wrote this Brief in whole or in part, and that no person or entity, other than *Amicus*, or its counsel made a monetary contribution to the preparation or submission of this Brief.

the ICC on behalf of the business community of China.

CCOIC's main responsibilities are to organize and promote trade, investment and economic and technological cooperation in various forms, to organize or participate in foreign negotiations and public-relations lobbying on behalf of enterprises, to provide advice on economic and trade policy-making and foreign trade negotiations, trade conflict-resolution, and to represent the Chinese business community in their participation in rule-making regarding the international economy and trade, and to make policy recommendations to the United Nations and ICC members.

In light of this mission, CCOIC and the business community it represents have a substantial interest in the developments in the United States courts, especially in the Supreme Court of the United States, which are bound to affect the business environment in both China and the United States as well as the volume of trade between them. This particular case has the potential to create substantial disruptions in business operations in China, and, as such, is of enormous interest to CCOIC, its membership, and the Chinese business community at large.

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 44.1 provides as follows:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

SUMMARY OF ARGUMENT

In this case Petitioners alleged that Respondents engaged in a certain price-fixing scheme injuring consumers in the United States. Respondents claimed that the scheme was government-mandated under Chinese law. The Ministry of Commerce (MOFCOM) of China participated in the proceedings below as *amicus curiae*, described itself as "the highest administrative authority in China authorized to regulate foreign trade, including export commerce", *see* MOFCOM *Amicus* Brief in Support of

Defendants' Motion to Dismiss, Petitioners' Cert Petition, at 190a, and represented that the scheme was required by Chinese law. *Ibid.*, 191-192a and *passim*. Subsequently the substance of this representation was also stated in a diplomatic note to the State Department. *See* Diplomatic Note No. CE027/14 from the Embassy of the People's Republic of China to the State Department, J.A. 782-783. The Court of Appeals for the Second Circuit held that in determining foreign law, the federal courts were bound to defer to this representation, or interpretation or characterization of Chinese law in issue, *In re: Vitamin C Antitrust Litigation*, 837 F.3d 175 (2nd Cir. 2016), referred to as "binding deference" for convenience. Whether this "binding deference" is proper is now presented before this Honorable Court.

In this Brief, *Amicus* respectfully submits as follows: I. Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference"; II. A distinction must be made, among the materials used to determine foreign law, between what may count as applicable law and the subsidiary means for determining applicable law, and the interpretation or characterization of Chinese trade law by MOFCOM counts as applicable law; III. The *Pink* precedent demands that binding deference be given to the

interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area; IV. The act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area; V. Alternatively and subsidiarily, the interpretation or characterization of Chinese trade law by MOFCOM as the highest administrative authority on trade law in China should be given substantial deference analogous to *Chevron* deference; and VI. The alleged inconsistency between China's representations to the WTO and its position in this case, even assumed to exist, does not affect the validity of its position in this case as a matter of domestic law and therefore the binding deference due to it.

ARGUMENT

I. Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference"

Federal Rule of Civil Procedure 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. The plain terms of this Rule make clear that Rule 44.1 addresses only what materials may be used in determining foreign law, not what effect to give to these materials, which effect must therefore be determined on considerations outside the Rule, and is consistent with whatever effect properly derived, including "binding deference" or "substantial deference". The last sentence, "The court's determination must be treated as a ruling on a question of law", attaches a certain nature to such a determination, which is a consequence of such an

operation to determine law, and does not affect the weight or effect to be given to the materials utilized.

Nothing in the drafting history of Rule 44.1 points to a different conclusion. As the Court of Appeals below pointed out,

> According to the advisory committee notes, the rule has two purposes: (1) to make a court's determination of foreign law a matter of law rather than fact, and (2) to relax the evidentiary standard and to create a uniform procedure for interpreting foreign law. Fed. R. Civ. P. 44.1 advisory committee's notes to 1966 adoption. The advisory committee notes suggest that Rule 44.1 was meant to address some of the challenges facing litigants whose claims and defenses depended upon foreign law and to provide courts with a greater array of tools for understanding and interpreting those laws. *Id.*

In re Vitamin C Antitrust Litigation, 837 F.3d, at 187.

Nor do the treaty provisions resorted to by Petitioners (Petitioners' Brief, 45-46 & n.13) and by the United States (U.S. Merits Brief, 30) militate in favor of a different conclusion. To some extent similar to Rule 44.1, these provisions address how to obtain materials on which to determine a question of foreign law, and state either that "[t]he information given in the reply shall not bind the judicial

authority from which the request emanated",[2] or that "[t]he State that receives the reports referred to in Article 3.c. shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received".[3] Obviously, this effect stated in the two provisions is a matter of *treaty law*. Clearly, they do not prevent or prohibit a contracting party from treating them as binding *by operation of its own national law*. Here, as will be demonstrated below, the operation of US law does accord binding deference to MOFCOM's interpretation of Chinese law on trade.

II. A distinction must be made, among the materials used to determine foreign law, between what may count as applicable law and the subsidiary means for determining applicable law, and the interpretation or characterization of Chinese trade law by MOFCOM counts as applicable law

Rule 44.1 essentially allows courts to utilize any useful materials in determining foreign law. In the nature of judicial decision-making, a distinction must be made, among the materials used to determine foreign law, between what may count as

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[2] The European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154.

[3] Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 111.

applicable law and the subsidiary means for determining applicable law, between rules of decision and the materials that may help courts reach rules of decision. The idea of rules of decision is most famously codified in the Rules of Decision Act, 28 U.S.C. § 1652, which states that, "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

In the area of international law, the most instructive is this Court's teaching in the celebrated case, *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning

> what the law ought to be, but for trustworthy evidence of what the law really is.

175 US 677 (1990), at 700. On this rationale, a treaty, controlling executive or legislative act or judicial decision, and, in their absence, customary international law, may be directly used as applicable law, while the works of jurists and commentators are only subsidiary means for helping courts find the customs and usages of various nations. The binding force given to the applicable law results from its force of law on the basis of consent or other proper exercise of authority. The weight given to these subsidiary means result not from any legal force of these scholarly works themselves but from their persuasiveness on the basis of trustworthy evidence of what the law is. Subsequently this idea has been codified in Article 38(1) of the Statute of the Permanent Court of International Law and the same article of the Statute of the International Court of Justice, where a distinction is made between applicable law (treaties, custom international law and general principles of law) and subsidiary means for the determination of rules of law.[4]

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[4] The Statute of the International Court of Justice, Article 38, provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

Apply this rationale or an analogy to it in this case before the Court, the interpretation or characterization of Chinese trade law by MOFCOM, as the authoritative decision-maker in this area—to be discussed below—are in the nature of applicable law or rules of decision, and count as such and should be treated as such: they have binding legal force in China. As a result, the statements made by MOFCOM in its interpretation or characterization Chinese trade law cannot be treated as some simple subsidiary means for the determination of foreign law.

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b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the eachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

III. The *Pink* precedent demands that binding deference be given to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area

The interpretation or characterization of Chinese trade law by MOFCOM in this case is that of the authoritative decision-maker in China. The *Pink* precedent demands that binding deference be given to it.

At issue in *U.S. v. Pink*, 315 U.S. 203 (1942), was the intended exterritorial effect of a Russian decree. Voluminous evidence was presented, including an official declaration of the "People's Commissariat for Justice of the R.S.F.S.R". The Court said, "We do not stop to review all the evidence in the voluminous record of the Moscow case bearing on the question of the extraterritorial effect of the Russian decrees of nationalization", *ibid.*, at 218, and held that "[t]he referee in the Moscow case found, and the evidence supported his finding, that the Commissariat for Justice has power to interpret existing Russian law. That being true this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned." *Ibid.*, at 220. The word "interpret" here obviously means "*authoritatively* interpret"; that is to say, the "People's Commissariat of Justice" was the authoritative decision-maker, and the Court

accorded binding deference to its official declaration on the intended effect of Russian law. This precedent applies to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.

Buttressing the argument for binding deference to MOFCOM's interpretation or characterization of Chinese trade law is the binding deference that U.S. federal courts give to the substantive state law decisions of a federal state's highest court. It is solidly established that "the views of the state's highest court with respect to state law are binding on the federal courts". *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); *see also Brown v. Ohio*, 432 U.S. 161, 167 (1977); *Garner v. Louisiana*, 368 U.S. 157, 169 (1961). The ultimate rationale for this rule is the fact that federal states retain a measure of sovereignty when they joined the Union. This measure of sovereignty renders a federal state similar to a sovereign foreign country and supports the application of this rule to the treatment of the interpretation by a like authority of that foreign country.

In *Pink*, the decision-maker is the "People's Commissariat for Justice", while in the *Wainwright* line of cases it is the highest court of a federal state. The nomenclature is not important; what is decisive is the fact that each is the authoritative decision-maker. In the area of trade law, MOFCOM is such authoritative decision-maker in China.

One should not be surprised that MOFCOM, an executive branch of the government, can be the authoritative decision-maker in trade law, nor should one be tempted to think that only the highest court or judicial authority of a country is the authoritative decision-maker for all matters. After all, the power of judicial review in the style of the celebrated *Marbury v. Madison* case, 1 Cranch 137 (1803), is not universal, or not yet, particularly not in the executive-led government systems. In some legal systems, a certain branch of the executive government is given the authority to act as the authoritative decision-maker in certain areas, whose decisions may not be directly invalidated by the judiciary. One need go no farther to see this than the United Kingdom Human Rights Act of 1998. Under that act, U.K. courts are directed to interpret laws as much as possible so as to comply with the European Convention on Human Rights—a sort of *Charming Betsy*, 6 Cranch 64 (1804), in operation without such a designation. But, if such a mode of interpretation is not able to solve all problems, courts are allowed only to make a declaration of incompatibility between the law in issue and the European Convention, and then leave the matter to the political branches. United Kingdom Human Rights Act of 1998, Sections 3, 4 & 10.

Similarly, in China, courts undertaking judicial review under the Administrative Litigation Act—with Chinese characteristics—of regulations made by administrative authorities may not directly

invalidate or vacate such regulations but may only make suggestions to the rule-making authorities on how to remedy them, which would leave them in full force, with inconveniences, until these authorities agree to do so. This is made clear recently by the Supreme People's Court of China in Article 149 of its Interpretive Directives on the Application of the Administrative Litigation Act, adopted on November 13, 2017.[5]

In any event, if there is an issue as to whether the MOFCOM is the authoritative decision-maker on trade law in China, this issue can be settled through a proper process in the courts.

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983), is inapposite here, contrary to what an *amicus* asserts. In that case, the Court decided not to defer to Cuban law on point, not in the process of determining foreign law or ascertaining what that foreign law means, but after finding out what means, and did so for a reason not relating to its meaning. There is great difference between the meaning of foreign law and the effect it should be given in the United States. Here before this Court is only the question as to how to decide what Chinese trade law means or its effect in the China.

Rejecting binding deference and subjecting the interpretation or characterization of foreign law by a foreign country's authoritative decision-maker to

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[5] Available at < http://www.court.gov.cn/fabu-xiangqing-80342.html> (last accessed April 3, 2018).

reexamination or reinterpretation by another country's courts will lead to chaos in international relations, especially international commerce. As has been pointed out:

> Holding that U.S. courts can second guess the highest administrative authority of a foreign state on interpretations of that state's law would raise serious practical problems. Most obviously, it would create difficulties for the regulated entities, who face the possibility of being told by a foreign regulator that they must do x and then being told by a U.S. court that the foreign regulator misunderstood its own domestic law and that they should not have done x.[6]

And this problem can be multiplied many times, perhaps as many as the total number of countries in the world, because other countries are mostly bound to adopt the same approach either on the basis of reciprocity or by the persuasion of the high profile and standing in the world of this Honorable Court. How can business people engaged in international commerce order their lives and production so as to

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[6] Daniel A. Crane, The Chinese Vitamins Case: Who Decides Chinese Law?, COMPETITION POLICY INT'L, at 4 (March 2018), available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/03/ North-America-Column-March-Full-Crane.pdf> (last accessed April 4, 2018).

eke out a living, not to mention aspiring to reap rewards from an economy of scale. Indeed, if chaos is preferred in some quarters, it is definitely to be avoided in international commerce.

The fact that in international litigation the United States "historically has not argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant material", or that "although other nations' approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight", US Merits Brief at 29, should not dissuade US courts from according binding deference to those by other countries' authoritative decision-makers. This situation does not result from other countries' refusal to accord such deference, but from the United States' own decision not to seek such deference. It may be there just for the asking. More importantly, this picture that the Solicitor General has painted is one of the past or, at best, the present; the future may have in store a different policy for the policy-makers, but courts cannot change course too often. Even more importantly, *Amicus* submits that the chaos and inefficiency that would result from subjecting the interpretation or characterization of U.S. law by its highest administrative authority in the matter of trade to differing interpretation around the world—possibly by more than 190 different countries, if they all reciprocate by not

according binding deference—would not be appreciated by that authority or the U.S. business community, either.

In short, the interpretation or characterization of Chinese trade law by MOFCOM is that by the authoritative decision-maker in this area in China, and the *Pink* precedent demands that binding deference be given to it.

IV. The act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area

The act of state doctrine as reflected in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and others "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory", *ibid.* at 401. This doctrine supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.

It is difficult to see how anything less than binding deference to the interpretation or characterization of a country's law by its authoritative decision-maker can be squared with the act of state doctrine. Precluded from inquiring into the validity of the public acts of another country,

the courts of this country cannot examine the propriety of such an interpretation or characterization. Reexamining or reinterpreting that interpretation or characterization is itself inquiring into the validity of that act of interpretation or characterization.

Underlying this doctrine are the "the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." *Ibid.*, 417-18 (internal quotation marks and citations omitted). Indeed, interpreting and reinterpreting another country's authoritative decision-maker's interpretation or characterization of its own laws amounts to saying that a foreign country does not know its own laws or does not know the meaning of its own laws. This would be an affront to an independent sovereign state, and is bound to imperil amicable and friendly relations between countries. In this case, interpreting and reinterpreting China's authoritative decision-maker's interpretation or characterization of its trade laws will no doubt cause an uproar in China, and adversely affect the already tense relations between the two countries.

Underpinning the act of state doctrine are also the constitutional considerations derived from the separation of powers in the United States, which require the avoidance of conflicts between the

judicial branch and the executive branch of the government in the area of international relations. As the Court put it so well,

> [The doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Ibid., at 423. These concerns are on full display in this very case. A conflict between the executive branch and the District Court below already has or at least is rearing its head. As Respondents show (Respondents' Merits Brief, at 42-44), the executive branch of the United States already successfully argued at the WTO on the price-fixing system as mandated by the MOFCOM, with the same legal framework applying to different commodities there, contrary to which position the District Court below spoke. Even if one were to work a hairsplitting distinction between the different

commodities or a minor difference in use of terms (required by *vs.* attributable to China) in issue (as the United States argues, US Merits Brief, at 31 & n.7), the same legal framework at work there would ensure a conflict will come to a head in due course. Such potential of a conflict obviously is also what the act of state doctrine is designed to prevent.

In short, the act of state doctrine as reflected in *Sabbatino* also supports binding deference to the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker in this area.

V. Alternatively and subsidiarily, the interpretation or characterization of Chinese trade law by MOFCOM as the highest administrative authority on trade law in China should be given substantial deference analogous to *Chevron* deference

One of the most prominent features of contemporary life under administrative regulation is the celebrated *Chevron* deference enunciated by this Honorable Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* Inc., 467 U.S. 837 (1984). There, the Court addressed the weight to be given to the interpretation of a statutory provision by an administrative agency receiving certain delegation of the legislature. The Court held that "if the statute is silent or ambiguous with respect to the specific issue,

the question for the court is whether the agency's answer is based on a permissible construction of the statute", *ibid.*, at 843. Or, as the Court observed, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Ibid.*, at 844.

Amicus submits that, if the interpretation or characterization of Chinese trade law by MOFCOM as the authoritative decision-maker is not given binding deference, it should be, alternatively and subsidiarily, recognized as the interpretation or characterization of Chinese trade law by the highest administrative authority in China and given substantial deference analogous to *Chevron* deference. Given such deference, as long as it is reasonable or permissible under Chinese law, the interpretation or characterization of Chinese trade law by MOFCOM must be respected.

Some have noted that the "domestic origins" of *Chevron* deference render it inappropriate for application to international relations. *Amicus* respectfully disagrees. Such "origins" considerations do not distract from the propriety of its application to a wider area, just like where a hero comes does not distract from his or her prowess. What matters most is whether the interpretation or characterization of trade law by MOFCOM is so similar, or so analogous to the interpretation by U.S. administrative agencies

accorded *Chevron* deference as to trigger the application of the "like cases must be treated alike" principle, thus the application of the *Chevron* precedent. Indeed, the two situations are so similar and so analogous that they cry out for the same treatment. As the highest administrative authority in the area of trade regulation, MOFCOM does—or did in the relevant time period—receive delegation from the legislature to regulate trade matters in China, and its authority in this area is near plenary. If any doubt on this point is entertained, it can be settled through a proper process, just as the issue as to whether MOFCOM is the authoritative decision-maker on trade law issues in China.

Born of international comity and respect for independent sovereign states, the equal treatment accorded to both the Federal Government and foreign governments in the federal courts in the area of foreign relations such as sovereign immunities[7] also counsels equal treatment for the administrative agencies of both the U.S. and a foreign government. Indeed, it has already been recognized by the Court of Appeals in *In re Oil Spill by the Amoco Cadiz Off the Coast of France*, 954 F.2d 1279, 1312 (7th Cir.

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[7] See, e.g., Restatement, Third, Foreign Relations Law of the United States, § 454 cmt. d ("as in regard to responsibility for actions of officials and employees, the . . . [FSIA] follows the corresponding provisions of the [FTCA]"); Reporters' note 3 ("[The discretionary function exception] is designed to place foreign states in the same position before United States courts as is the United States itself when sued under the Federal Tort Claims Act.").

1992), that, "Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable."

Of great importance to international commerce is the uniform application of law and the resultant efficiency that the application of *Chevron* deference would bring, just as would binding deference, already discussed above. We all know that business people like uniform application of the law as well as efficiency, on which their livelihood depends. The unique way *Chevron* deference promotes uniform application of law and efficiency by placing the agency as the prime actor in a particular space has been appreciated in the literature. [8] That beauty knows no geographical limitations or national boundaries.

Finally, *Amicus* submits that the interpretation or characterization of Chinese trade law by MOFCOM no doubt meets the "reasonable" or "permissible" standard, and the District Court should not have substituted its "better" view for that of the MOFCOM.

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[8] Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight", 112 Columbia L. Rev 1143 (2012); Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Columbia L. Rev. 1093 (1987).

VI. The alleged inconsistency between China's representations to the WTO and its position in this case, even assumed to exist, does not affect the validity of its position in this case as a matter of domestic law and therefore the binding deference due to it

Petitioners and some *amici* have made much of the alleged inconsistency between China's representations to the WTO and its position in this case. Respondents have clearly demonstrated that there is no such inconsistency. Brief for Respondents 40-41. Nothing more can be added in this regard.

However, it is respectfully submitted that such inconsistency, even assumed to exist, does not affect the validity of China's position in this case as a matter of domestic law and therefore the binding deference due to it. This point is illustrated to the full by this Court in *Medellín v. Texas*, 552 U.S. 491 (2008), a case on the death penalty, a matter of considerably greater moment than the price-fixing at issue in this case. There the Court made a distinction between international obligation and domestic obligation, *ibid.* at 520, and between the U.S. President's international representation and international responsibility, on the one hand, and his unilateral authority to create domestic law, on the other, *ibid.*, 529. Regarding application in the United States, the domestic authority prevails. Here in this case, if it is assumed that China indeed made a

representation to the WTO and then acted inconsistently in its domestic sphere, such inconsistency could be the basis for the international responsibility of China, but would not affect the validity of its decisions domestically and, therefore, the binding deference due to it from the U.S. courts.

CONCLUSION

For all the above reasons, the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 16-1220

In The Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO., LTD., *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTEREST OF THE *AMICI*[1]

Amicus curiae YING Songnian is University Professor at the China University of Political Science and Law (CUPL), Honorary President of the Administrative Law Studies Institute of China Law Society (ALSCLS) and Chairman of the East Asia Institute of Administrative Law. Professor YING was a deputy to the 9th and 10th National People's Congress (NPC) and a member of the NPC Committee for Internal and Judicial Affairs. He is a principal leader of the Committee of Legislative Studies on Administrative Law of the NPC Commission of Legislative Affairs, an expert advisory body on administrative law to the NPC Standing Committee. In that capacity, he was involved in the drafting of various People's Republic of China (PRC) statutes, including the Administrative Litigation Law, State Compensation Law, Law on Administrative Penalties, Law on Legislation and Administrative License Law of the People's Republic of China.

Amicus curiae MA Huaide is Professor and Vice President of CUPL, President of ALSCLS and Editor-in-Chief of Administrative Law Studies. Professor MA

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[1] All parties to the case have consented to the filing of this brief. Petitioners consented in writing, and Respondents provided blanket consent by a February 15, 2018 letter to the Clerk. In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel has made any monetary contribution toward the preparation or submission of this brief.

was China's first Ph.D. in the study of administrative litigation law (from CUPL). He has been a senior visiting scholar at Yale University and a visiting scholar at Boston University and the University of Sydney (Australia). He was involved in the formulation of the State Compensation Law, Law on Administrative Penalties, Law on Legislation and Administrative License Law, among other statutes. He concurrently acts as legal counsel to PRC government agencies including the National Development and Reform Commission and the Ministry of Housing and Urban-Rural Development.

Amicus curiae JIANG Ming'an is Professor of Law and Director of the Constitutional and Administrative Law Center at Peking University (PKU), Vice President of ALSCLS and Editor-in-Chief of Administrative Law Review. Professor JIANG has been a senior visiting scholar at UCLA and the University of Cambridge (UK) and a visiting scholar at the University of Washington. He has been involved since 1984 in the formulation of PRC administrative laws and regulations, among them the Administrative Litigation Law, Administrative Review Law, State Compensation Law, Law on Administrative Penalties, Law on Legislation, Administrative License Law and Administrative Enforcement Law. He is a special advisor to the Supreme People's Court and an expert advisor to government agencies such as the Ministry of Civil Affairs and Ministry of Culture.

Amicus curiae YU An is Professor of Law in the School of Public Policy and Management (SPPM) and Director of the Institute of Government at Tsinghua

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Amici have an academic interest in, and expertise on, the subject of whether the Ministry of Commerce of the People's Republic of China, or MOFCOM (formerly

the Ministry of Foreign Trade and Economic Cooperation, or MOFTEC; hereinafter referred to as "Ministry of Commerce")[2] is an authoritative interpreter of the rules it makes. Petitioners' Brief, as well as the Brief of *Amici Curiae* Donald Clarke and Nicholas Calcina Howson in Support of Petitioners, have challenged the Ministry of Commerce's representation to the Second Circuit that it "has unquestioned authority to interpret applicable Chinese law." Pet. Br. 20; *see* Clarke & Howson *Amicus* Br. 17. This brief supports Respondents and the Ministry of Commerce, by explaining that a foundational principle underlying the Chinese system of legal interpretation is the concept that "the rule-maker has the authority to interpret the rule," and thus the Ministry of Commerce has authority to interpret applicable Chinese law.

SUMMARY OF ARGUMENT

The Ministry of Commerce is the constituent ministry primarily responsible for regulating China's international trade, and is immediately under the level of the State Council (equivalent to a cabinet-level department in the United States). In response to the Ministry of Commerce's *amicus* briefs in this matter concerning its "2002 Notice,"[3] Petitioners (and the

[2] Petitioners' Brief refers to the Ministry of Commerce as "the Ministry." Pet. Br. 5 & n.3.

[3] GUAN YU TIAO ZHENG CHU KOU SHANG PIN HAI GUAN SHEN JIA MU LU DE TONG ZHI [Notice Regarding Adjustment of the Customs Price Verification Catalogue of Export Commodities] (Wai Jing

supporting *amicus* brief by Clarke and Howson) have challenged the Ministry of Commerce's representation that it "has unquestioned authority to interpret applicable Chinese law." Pet. Br. 20; *see* Clarke & Howson *Amicus* Br. 17. The Ministry of Commerce's interpretative authority under Chinese law, however, is clear and well-established. In accordance with China's system of legal interpretation, the Ministry of Commerce has the power to interpret its own rules. The Ministry of Commerce makes legally binding and authoritative interpretations of the rules it establishes both through administrative rulemaking and through documents setting forth administrative standards.

A foundational principle underlying the Chinese system of legal interpretation is the concept that "the rule-maker has the authority to interpret the rule." The Law on Legislation; the Regulations on Procedures for the Formulation of Administrative Regulations; and the Regulations on Procedures for the Formulation of Rules each provide that the entity establishing statutes or rules necessarily has authority to interpret these statutes and rules. The reason why China's system of legal interpretation has established the principle of "the rule-maker has the authority to interpret the rule," is because China ascribes to the belief that the goal of legal interpretation is to seek out the rule's original intended meaning. The entity that

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Mao Mao Fa [2002] No. 187), Mar. 29, 2002, http://wms.mofcom.gov.cn/article/zcfb/200208/20020800037837.shtml (P.R.C.).

established the rule is the entity that is best suited to explain the original meaning.

Based on this principle of "the rule-maker has the authority to interpret the rule," the Ministry of Commerce has the authority to interpret its 2002 Notice because it was the Ministry of Commerce that prepared and issued the administrative rule. In the PRC, it is uncontroverted that the Ministry of Commerce has the authority to interpret its own rules. And the Ministry of Commerce is continuously doing so, issuing interpretations through a variety of means, including opinions, notices, provisional rules, response letters, formal replies, and other documents.

The principle that "the rule-maker has the authority to interpret the rule" does not exclude other governmental bodies from interpreting rules. The authority to interpret rules is not restricted to a single governmental entity. However, the rule-maker's own interpretation is authoritative. For example, other governmental bodies may interpret laws passed by the National People's Congress (NPC) and its Standing Committee, but the NPC Standing Committee's own interpretation is the most authoritative, and other interpretations must be consistent with the NPC Standing Committee's interpretations. When a ministry (such as the Ministry of Commerce) interprets the very rules that it has created, its interpretation is authoritative. All other ministries must follow that ministry's authoritative interpretation, which plays an important role in guiding subordinate administrative

bodies in implementing their administrative enforcement activities.

The authoritativeness of the Ministry of Commerce's interpretation of the rules it has created is not reduced by the existence of mechanisms for analyzing and supervising the implementation of those interpretations. The interpretations are authoritative because the government body's act of interpretation – here, by the Ministry of Commerce – has regulatory impact and the force of law.

Moreover, in China, the rule-maker's interpretation of its own rules is controlling upon the courts. When a State Council ministry – such as the Ministry of Commerce – interprets its own regulations, the Chinese courts give those interpretations deference because the ministry best understands the original intent and purpose of its own regulations. Deference is also given for the public policy reason that a ministry under the State Council, which is responsible for regulating matters within its field, is in a better position to address specialized issues and policy issues in that area.

Here in particular, where foreign trade is a sector requiring strong specialized knowledge and policy expertise, Chinese courts would be compelled – outside of extreme cases where the interpretation clearly violates the law or a ministry has abused its power – to defer to the guidance of the responsible ministry, the Ministry of Commerce. The deference accorded to the Ministry of Commerce's own rules in China vitiates

Petitioners' questioning of the Ministry of Commerce's "law-*interpreting* power." *See* Pet. Br. 43 (emphasis in original).

ARGUMENT

The Ministry of Commerce[4] issued the "2002 Notice" at issue in this suit and filed the *amicus* brief before the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit concerning Chinese law. It correctly asserted in its *amicus* brief to the Second Circuit that it "has unquestioned authority to interpret applicable Chinese law." Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China at 14, Dkt. 105, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014). The Ministry of Commerce's assertion reflects a well-established principle under Chinese law. In accordance with China's system of legal interpretation, the Ministry of Commerce has the power to interpret its own rules. The Ministry of Commerce makes legally binding and authoritative interpretations of the rules it establishes both through administrative rulemaking and through documents setting forth administrative standards.

[4] The Ministry of Commerce, in its position immediately under the State Council, is equivalent to a United States cabinet-level department, and is primarily responsible for regulating China's international trade.

I. It is a Foundational Principle of Chinese Law that "The Rule-Maker has the Authority to Interpret the Rule"

The Chinese system of legal interpretation holds that government entities necessarily have authority to interpret the rules they make, *i.e.*, "the rule-maker has the authority to interpret the rule." *See, e.g.*, ZHANG Zhi Ming, *Fa lü jie shi xue* [The Study of Legal Interpretation] 152 (Beijing: Zhongguo Renmin Daxue Chubanshe [China Renmin University Press], 2015) (hereinafter "The Study of Legal Interpretation").[5] That doctrine is not only a foundational principle of Chinese legal theory, it is also set forth in law. Article 33 of the Regulations on Procedures for the Formulation of Rules states "the power to interpret rules shall reside with the rule-maker." GUI ZHANG ZHI DING CHENG XU TIAO LI [Regulations on Procedures for the Formulation of Rules] art. 33 (promulgated by Decree No. 322 of the State Council of the People's Republic of China,

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[5] As that treatise explains, "Statutes, administrative regulations, and local regulations are all of the same nature. What must be noted here is that the concept *'the rule-maker must have the authority to interpret laws'* does not need to itself be law in order to be firmly accepted by the people without any doubts at all. This is because the common accepted belief among the people is that legal interpretation must match the original intent of the legislature and must match the intended purpose behind the creation of the law. And when it comes to the original intent or the purpose behind the creation of the law, there is nobody who knows it better than the legislative body itself." ZHANG Zhi Ming, The Study of Legal Interpretation, at 152 (emphasis added).

Nov. 16, 2001), http://www.gov.cn/gongbao/content/2002/content_61556.htm (P.R.C.).

A number of other Chinese laws set forth the right of individual rule-making bodies, such as the NPC, to interpret the rules it makes. Thus, for example, Article 45 of the Law on Legislation provides that the NPC Standing Committee is the proper authority for interpreting the statutes[6] passed by the NPC: "The power to interpret a national law shall vest in the Standing Committee of the National People's Congress." LI FA FA [Law on Legislation] art. 45 (as amended, promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm (P.R.C.).[7] A similar rule, embodying the same fundamental principle, expressly applies to regulations. Article 31 of the Regulations on Procedures for the Formulation of Administrative Regulations provides, "The State Council shall interpret those articles of administrative regulations that need further definitions or supplementary provisions." XING ZHENG FA GUI ZHI DING CHENG XU TIAO LI [Regulations on

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[6] The reference to statutes here means the legal norms set by the NPC and its Standing Committee. The statutes made by the NPC are interpreted by its Standing Committee as the entire NPC only meets once a year whereas the NPC Standing Committee is a permanent organ of the NPC. *See* XIAN FA [The Constitution] art. 57, Mar. 11, 2018 (P.R.C.). An English translation of the 2007 version of the Constitution is available at: http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372965.htm. The Constitution was amended in March 2018, but the language of art. 57 remains unchanged.

[7] An English translation is available at: https://www.chinalawtranslate.com/2015lawlaw/?lang=en.

Procedures for the Formulation of Administrative Regulations] art. 31 (promulgated by Decree No. 321 of the State Council of the People's Republic of China, Nov. 16, 2001), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=38101 (P.R.C.).[8]

The reason why China's system of legal interpretation has established the principle of "the rule-maker has the authority to interpret the rule" is because China ascribes to the belief that the goal of legal interpretation is to seek out the rule's original intended meaning. The entity that established the rule is the entity that is best suited to explain the original meaning. This is why China's legal community has a common understanding that the entity that creates the rule necessarily has the authority to interpret it. As

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[8] Effective May 1, 2018, this regulation has been amended to provide, "The State Council shall interpret administrative regulations in any of the following circumstances: (1) where the specific meaning of provisions of administrative regulations needs to be further clarified; or (2) where the emergence of new circumstances after formulation of administrative regulations requires clarification of their applicable basis." XING ZHENG FA GUI ZHI DING CHENG XU TIAO LI [Regulations on Procedures for the Formulation of Administrative Regulations] art. 31 (promulgated by Decree No. 321 of the State Council of the People's Republic of China on Nov. 16, 2001, and revised pursuant to art. 17 of Decree No. 694 of the State Council of the People's Republic of China, the Decision of the State Council on Revising the Regulations on Procedures for the Formulation of Administrative Regulations, dated Dec. 22, 2017, and effective as of May 1, 2018), http://www.gov.cn/zhengce/content/2018-01/16/content_5257039.htm (P.R.C.). An English translation of the current version is available at: http://www.gov.cn/english/laws/2005-08/24/content_25827.htm. An English translation of the amended version is available at: https://law.yale.edu/system/files/documents/pdf/china/2018_sc_en_rev_admin_regulation_procedure.pdf.

explained by Professor DONG Hao (the Vice President of the Administrative Law Studies Institute of China Law Society[9]), "Legislation is the act of turning the legislator's intent into law. Therefore, the purpose of legal interpretation is to seek out and implement the legislator's intent. This is why the legislative body itself is the most appropriate entity for interpreting these laws." DONG Hao, *Si fa jie shi lun* [Judicial Interpretation Theories], 278 (Beijing: Zhongguo Zhengfa Daxue Chubanshe [China University of Political Science and Law Press], 1999).

This concept, that legal interpretation consists of seeking out and implementing the intent of the legislature, is repeatedly expressed in Chinese laws and regulations. In cases of national significance, the NPC Standing Committee has reiterated that it is legislative intent that must be followed when interpreting and applying the law. In the case of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"), the NPC Standing Committee has passed laws specifically requiring that legislative intent be implemented. Thus, in the Interpretation by the NPC Standing Committee of Article 22.4 and Article 24.2(3) of the Basic Law, the Standing Committee explained that its object was to give effect to the legislative intent behind Hong Kong's Basic Law: "The original legislative intent elucidated

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[9] Professor DONG Hao, in addition to being Vice President of ALSCLS, was previously Vice President of Zhuhai Intermediate People's Court in Guangdong. He is one of the most respected Chinese scholars on the issue of legal interpretation.

by this Interpretation and the original legislative intent of the other categories of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region have been embodied in the Opinions on the Implementation of the Second Paragraph of Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which were adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on August 10, 1996."[10] In other words, in interpreting the meaning of the Basic Law, the NPC Standing Committee not only looked to the legislative intent of the Basic Law, but it has even issued its own directives setting forth this legislative intent and instructing others on the need to apply this legislative intent.

As these authorities make clear, the principle that "the rule-maker has the authority to interpret the rule" is firmly established under Chinese law.

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[10] QUAN GUO REN MIN DAI BIAO DA HUI CHANG WU WEI YUAN HUI GUAN YU "ZHONG HUA REN MIN GONG HE GUO XIANG GANG TE BIE XING ZHENG QU JI BEN FA" DI 22 TIAO DI 4 KUAN HE DI 24 TIAO DI 2 KUAN DI (3) XIANG DE JIE SHI [Interpretation by the Standing Committee of the National People's Congress of Article 22.4 and Article 24.2(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law")] (adopted by the Standing Comm. of the Nat'l People's Cong., June 26, 1999), http://www.npc.gov.cn/wxzl/gongbao/2001-02/06/content_5004737.htm (P.R.C.). An English translation is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383897.htm.

II. The Ministry of Commerce's Interpretation of Its Rules is Authoritative

In accordance with the principle of Chinese legal interpretation that "the rule-maker has the authority to interpret the rule," the Ministry of Commerce has the authority to interpret the 2002 Notice it issued.

The Ministry of Commerce's *interpretive* authority is amply supported by Chinese law. For example, the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (1981) not only provides that the NPC Standing Committee shall exercise the power to interpret law, it also specifically states that the power of interpretation also resides in the Supreme People's Court, Supreme People's Procuratorate, the State Council and the ministries of the State Council.[11] The

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[11] The Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law of 1981 expressly provides that the State Council and its ministries shall have power to interpret the laws and decrees (*e.g.*, to interpret the legal rules established by the NPC and its Standing Committee). QUAN GUO REN MIN DAI BIAO DA HUI CHANG WU WEI YUAN HUI GUAN YU JIA QIANG FA LÜ JIE SHI GONG ZUO DE JUE YI [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (adopted by the Standing Comm. of the Nat'l People's Cong., June 10, 1981), http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004401.htm (P.R.C.). An English translation is available at: http://www.asianlii.org/cn/legis/cen/laws/rotscotnpcpaiiotl1125/. The conclusion by Professor Donald Clarke and Professor Nicholas Howson in their Brief of *Amici Curiae* that the Ministry of Commerce has no authority to interpret statutes is wrong. *See* Clarke & Howson *Amicus* Br. 19.

Ministry of Commerce is one of the ministries of the State Council and thus it has specific authorization to interpret law from the NPC.

The State Council has also issued formal regulations stating that ministries – such as the Ministry of Commerce – have the authority to interpret administrative regulations. In particular, the Notice of the State Council General Office Concerning the Authority of Interpretation of Administrative Regulations and Procedural Matters states that both the State Council and the ministries under the State Council have the authority to interpret administrative regulations. GUO WU YUAN BAN GONG TING GUAN YU XING ZHENG FA GUI JIE SHI QUAN XIAN HE CHENG XU WEN TI DE TONG ZHI [Notice of the State Council General Office Concerning the Authority of Interpretation of Administrative Regulations and Procedural Matters] (Guo Ban Fa [1999] No. 43) (promulgated by the State Council General Office, May 10, 1999), http://www.law-lib.com/law/law_view.asp?id=107706 (P.R.C.). In fact, the reality is that ministries (such as the Ministry of Commerce) are the ones that actually handle the overwhelming majority of regulatory interpretation due to their subject-matter expertise and the massive number of regulations at issue. The Ministry of Commerce, for its part, has been constantly and continuously interpreting its own rules through opinions, notices, provisional rules, response letters, formal replies, and through other documents.

The principle that "the rule-maker has the authority to interpret the rule" does not necessarily mean that other authorities are excluded from interpreting

rules. In other words, the authority to interpret rules is not restricted to a single entity. But the Ministry of Commerce is unquestionably one of the entities with authority to interpret the law. The ministries under the State Council (such as the Ministry of Commerce) have authority to interpret both laws and regulations, and in fact do so on a regular basis. Those interpretations are treated as authoritative, and are deferred to by courts, procuratorates and administrative bodies. *See infra* Part III.

III. The Ministry of Commerce's Interpretation Remains Authoritative and is Deferred to by Chinese Courts

The *amici* Clarke and Howson argue that China's system of checks and balances somehow contradicts or diminishes the authority of the Ministry of Commerce to interpret its rules.[12] Clarke & Howson *Amicus* Br. 19.

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[12] Clarke and Howson also argue against the deference afforded by the Second Circuit, contending that "[t]he Chinese Government is not a neutral observer," and "may have a party-like interest in the case." Clarke & Howson *Amicus* Br. 8 (capitalization omitted). Yet even though China's state-owned enterprises are frequent parties to U.S. litigation, the Ministry of Commerce has never appeared in U.S. litigation until the present case. The complete absence of any Ministry of Commerce participation in past U.S. litigations refutes the claim that the Ministry of Commerce is doing so here because "a mercantilist government such as China's . . . is going to view siding with its nationals as a policy imperative," *id.* at 10.

To the contrary, the allegation of "partiality . . . in this case," *id.* at 10, is more applicable to those who are repeatedly hired as expert witnesses in cases involving foreign law, *see id.* 1-2. The

They argue that the Ministry of Commerce's regulatory interpretations could be deemed invalid if the interpretation somehow violated other laws.[13] *Id.* Yet

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Second Circuit's rule is preferable to U.S. trial courts attempting to weigh foreign governments' statements about their own law against the testimony of partisan expert witnesses. This is especially true considering that "relatively few judges are experienced in the area [of foreign law] and the procedures of foreign legal systems are often poorly understood." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 552 (1987) (Blackmun, J., concurring in part and dissenting in part).

[13] Clarke and Howson also assert that the Chinese government has a "party-like interest in the case" because Hebei Welcome Pharmaceutical Co. Ltd. is a subsidiary of a state-owned enterprise, and is therefore "deemed under the Chinese system to be a state-owned enterprise." Clarke & Howson *Amicus* Br. 8-9. However, in three previous appearances as an expert witness for plaintiffs suing Chinese litigants, Clarke has taken contradictory positions as to whether or not a subsidiary of a state-owned enterprise is itself a state-owned enterprise. *See Stansell v. BGP, Inc.*, 8:09-cv-2501, Dkt. 56 (M.D. Fla. Apr. 29, 2010) (subsidiary of state-owned enterprise "is not considered 'state-owned' under Chinese corporate law" and is "*not* [to be] deemed 'state-owned' " (emphasis in original)); *Ocean Line Holdings Ltd. v. China Nat'l Chartering Corp.*, 1:07-cv-08123, Dkt. 28 (S.D.N.Y. Jan. 30, 2008) (again concluding that the subsidiary of state-owned enterprise is not "owned by the Chinese state" but rather is owned by the parent company); *Trans Chemical Ltd. v. China Nat'l Machinery Import and Export Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997) (concluding that a subsidiary of a state-owned enterprise *is* itself a state-owned enterprise). Clarke's contradictory positions demonstrate just how distant the connection is between (1) a ministry of (2) China's State Council and (3) a subsidiary of (4) a parent company that is owned by (5) an entity that is controlled by (6) the government. The Chinese government does not have a "party-like interest" in every case to which it can be linked through six degrees of separation.

they do not provide a single example of any Ministry of Commerce interpretation of its regulations being invalidated, and they certainly do not suggest that the Ministry of Commerce regulations at issue here are invalid or even challenged in China. More importantly, the theoretical possibility of a Ministry of Commerce interpretation being held invalid does not alter the fact that the Ministry of Commerce has the clear authority to interpret its own regulations, consistent with the principle that "the rule-maker has the authority to interpret the rule," and contrary to Petitioners' arguments, *see* Pet. Br. 42-43.

While courts, procuratorates and other administrative bodies will inevitably interpret laws while discharging their administrative or judicial functions, the interpretations by the issuing ministry are treated as authoritative, and are deferred to by the courts and other governmental bodies. Indeed, Chinese courts implement the interpretations given by China's ministries, such as the Ministry of Commerce.

Thus, in the case of Huazhong Bearing Factory against the Labor Bureau of Binhu District, Wuxi Municipality (*see* App. A),[14] the appellate court cited to and

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[14] HUA ZHONG ZHOU CHENG CHANG BU FU WU XI SHI BIN HU QU LAO DONG JU SHE HUI BAO ZHANG XING ZHENG QUE REN AN [Huazhong Bearing Factory v. Labor Bureau of Binhu District, Wuxi Municipality] (Intermediate People's Court of Wuxi Municipality, Jiangsu Province (2005) Xi Xing Zhong Zi No. 50, Oct. 31, 2005). This case was included in China's Key Trial Cases Abstract – Administrative Trial Case Volume, which was compiled in 2007 in a joint project by the National Judges College and Renmin University Law School (China Renmin University Press and People's

applied the interpretation given by the government ministries without conducting its own analysis:

> According to the Ministry of Labor and Social Security's regulation entitled "Response Letter Regarding the Interpretation of the Phrase 'Willful Violation of Rules' Within the 'Trial Measures on Work-Related Injury Insurance for Enterprise Employees,'" the term "willful violation of rules" refers specifically to malicious acts undertaken with a conscious motive and purpose. The phrase should not apply to ordinary violations of rules. JIANG Yonglin did not intend for the injury to occur. . . . Therefore, it meets the criteria for work-related injuries.

App. A at 16-17. In reaching its decision as to the proper interpretation of a disputed phrase, the court followed the interpretation given by a ministry immediately under the State Council. *See id.*

Chinese courts are obligated to defer to ministry interpretations for the public policy reason that a ministry under the State Council is responsible for regulating matters within its field, and is therefore in a better position to address specialized issues and policy issues in that domain. Foreign trade is a sector that

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Court Press, 2008. P323). At the time this case was collected as a "Key Trial Case," China had not yet created a generally accessible database of cases, and so this case was one of a select few chosen as exemplars. China's Key Trial Cases Abstract was created and published in part by the National Judges College, which is affiliated with China's Supreme People's Court. A certified English translation is included at App. A.

requires strong specialized knowledge and policy expertise, and so courts will be compelled to defer to the guidance of the responsible ministry. In the case of Tianjin Yuyou Enterprise Co., Ltd. against Tianjin Economic and Technological Development Area Administrative Committee (*see* App. B),[15] a contentious question was whether the Provisional Regulations on the Administration of Voluntary Quotas for Export Products promulgated by MOFTEC [the former name for MOFCOM, *i.e.*, the Ministry of Commerce] in April 1995 was binding upon export license applications that had been made prior to the implementation of the new regulations. *See id.* Neither the Tianjin Higher People's Court nor the Supreme People's Court conducted any substantive review of MOFTEC's interpretation. *See id.* Rather they deferred to MOFTEC's interpretation and applied that interpretation to the case. *See id.* Thus, contrary to Petitioners' and Clarke and Howson's *amicus* arguments, the Ministry of Commerce's interpretations have already been treated as binding by China's Supreme People's Court.

CONCLUSION

For the foregoing reasons, Petitioners' questioning of the Ministry of Commerce's "law-*interpreting* power" is without merit. *See* Pet. Br. 42-43; *see also* Clarke &

[15] TIAN JIN YU YOU QI YE YOU XIAN GONG SI YU TIAN JIN JING JI JI SHU KAI FA QU GUAN LI WEI YUAN HUI XING ZHENG JIU FEN ER SHEN AN [Tianjin Yuyou Enterprise Co., Ltd. v. Tianjin Economic and Technological Development Area Administrative Committee] (Supreme People's Court (1997) Xing Zhong Zi No. 21, July 3, 1998).

Howson *Amicus* Br. 17. Under China's system of legal interpretation, the rule-maker has the power to interpret the rules it makes. This is known as the doctrine of "the rule-maker has the authority to interpret the rule." This doctrine is rooted in Chinese legal theory, expressed in Chinese laws and regulations, recognized by Chinese courts, and specifically extends to the Ministry of Commerce's interpretative authority over the 2002 Notice it created and that is at issue in this suit.

Respectfully submitted,

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No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

PETITIONERS,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE DONALD CLARKE AND NICHOLAS CALCINA HOWSON IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI[1]

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[1] The parties to the case have consented in writing to the filing of this brief. No party other than *amici* and their counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

Chinese law and legal institutions, with a focus on China's corporate law and securities regulation, and private and public enforcement of corporate and securities law norms in the Chinese courts or by Chinese administrative agencies. He has served as a consultant on Chinese law matters for a number of U.S. and international institutions and served as an expert witness on Chinese law matters in U.S. federal court litigation, U.S. agency enforcement proceedings, international and Chinese arbitrations, and in litigation before the Beijing Higher People's Court. He has just concluded service as the only non-Chinese citizen member of the Asian Development Bank-funded expert group advising the Chinese legislature on wholesale amendment of the 2006 Securities Law of China. Professor Howson is also a member of the Council on Foreign Relations.

Amici have academic expertise and a strong interest in the proper interaction of the United States legal system with the Chinese legal system.

SUMMARY OF ARGUMENT

The Second Circuit has held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016). This rule of conclusive deference should be rejected because it requires courts to ignore

reality and to sacrifice the search for truth and accuracy in adjudication to other, lesser values.

That a foreign legal system is complex strengthens rather than weakens the case for an inquiry into foreign law that takes into account a wide range of sources as opposed to a single source.

Conclusive deference to a foreign government's statements is particularly inappropriate when there is reason to believe that the foreign government has an interest in the case akin to that of a party. In this case, the District Court found facts strongly suggestive of the partiality of China's Ministry of Commerce (the "Ministry" or "MOFCOM"), the entity that submitted the statements in question. Yet the Second Circuit's rule would foreclose any inquiry that would uncover such facts.

A rule of conclusive deference also renders irrelevant the critical fact that, as in this case, a foreign government has made contradictory statements on the point at issue. To hold that courts must simply accept a government's most recent statement, or the statement submitted in the litigation before them, is an impermissible abdication of the responsibility of courts to determine the content of foreign law with accuracy.

The problem of contradiction is compounded by the fact that MOFCOM's assertion that it has "unquestioned authority to interpret applicable Chinese law" is a mere *ipse dixit* accompanied by no authority or argument. In

fact, MOFCOM is a mere ministry within the Chinese central government and, like other ministries, may not make rules that contravene higher-level norms, such as statutes. Not only does MOFCOM have no authority to interpret statutes, but Chinese law is clear that ministries may not be the final arbiters of the validity of their own rules within the Chinese legal system. Asserting that its authority to interpret law is unquestioned does not make it so.

This case involves the interaction of two legal systems. The key question in this case is whether a "true conflict" existed between the laws of China and the United States such that "compliance with the laws of both countries [was] . . . impossible[.]" *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–99 (1993). To be sure, a court should attempt to "reconcile[] the central concerns of both sets of laws." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987). But it must in the end do so itself, and cannot uncritically delegate any part of this task to a foreign government.

Finally, conclusive deference is not required by considerations of deference to the foreign policy powers of the executive branch. The executive branch has already made its position clear in this case: it desires courts to make determinations of foreign law without granting conclusive deference to the expressed views of foreign governments. *See* Brief for the United States as Amicus Curiae, *Animal Science Products, Inc. v. Hebei Welcome*

Pharm. Co., 86 U.S.L.W. 3351 (2018) (No. 16-1220).

ARGUMENT

I. The Complexity of a Foreign Legal System Strengthens Rather than Weakens the Case Against Conclusive Deference

Federal Rule of Civil Procedure 44.1 ("Rule 44.1") states that the determination of foreign law is a question of law for the court and not a question of fact for the jury. *See* Fed. R. Civ. P. 44.1. The court may consider "any relevant material or source[.]" *Id.* In sum,

> Rule 44.1 reflects a judgment that courts should have "maximum flexibility about the material to be considered and the methodology to be employed in determining foreign law in a particular case." Courts rely on a variety of materials, including "[s]tatutes, administrative material, and judicial decisions"; "expert testimony" interpreting those primary sources; and "any other information" that may be probative.

Brief for the United States as Amicus Curiae at 7, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 86 U.S.L.W. 3351 (2018) (No. 16-1220) (internal citations omitted).

Respondents have argued, and the Second Circuit agrees, *see In re Vitamin C Antitrust Litig.*, 837 F.3d at 190–91, that Chinese law is complicated and often ambiguous. In the words of

the Respondents' expert in the District Court proceedings, Professor Shen Sibao:

> Many official requirements are . . . transmitted through communications that may consist of department documents or oral directions, even including telephone calls. It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction.

Defs.' Decl. Supp. Summ. J. Ex. 4, at 5, *In re Vitamin C Antitrust Litig.*, No. 1:06-md-01738-BMC-JO (E.D.N.Y. Nov. 23, 2009), ECF No. 394-2.

But this strengthens rather than weakens the case for a realistic inquiry by the trial court instead of unthinking deference to an official statement. Far from assuming that the Chinese legal system was similar to that of the United States, the District Court took explicit notice of its difference:

> At the outset, I am compelled to note that the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of "law" as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system. To give but one example, the regulatory system governing vitamin C not only relies on consensus-based decision making, but also accords defendants wide, and possibly unbounded, discretion in setting the price

> and output levels for vitamin C. In addition, defendants' own expert asserts that oral directives are an important component of Chinese regulatory law and admits that "Chinese governmental control is a quite different process from what takes place in other countries." Of course, foreign legal regimes that are markedly different from our own can still, in their own unique ways, compel a defendant's conduct. However, in some circumstances, asserting a claim of compulsion under a foreign regime that so differs from our own concept of law can be akin to trying to fit a round peg into a square hole.

In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 550 (E.D.N.Y. 2011).

In such circumstances, it is entirely proper for a court to consider the views of a foreign government, which may offer valuable insights into the reality of a regulatory regime that diverges from its apparent form on paper. But it is equally proper for a court to take evidence from other parties as to what that reality was, especially when the government in question has demonstrated an intense interest in the outcome of the litigation, *see infra* Part II, and has made contradictory statements in the past, *see infra* Part III.

II. Conclusive Deference Is Inappropriate When a Government Has or May Have a Party-Like Interest in the Case

Conclusive deference to a foreign government's interpretation of the foreign state's law is inappropriate where, as here, the foreign government has or may have an interest in the litigation akin to that of a party. This raises the possibility that the government's characterization of its own law could be opportunistic and not neutral, and hence calls for further investigation, not blind deference.

The Chinese government is not a neutral observer of this case. Respondent North China Pharmaceutical Group Corp. ("North China Group") is an entity indirectly owned by the State-Owned Assets Supervision and Administration Commission of Hebei Province, China and deemed under the Chinese system to be a state-owned enterprise. *See* Brief in Opposition at iii, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 86 U.S.L.W. 3351 (2018) (No. 16-1220). Respondent Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome") is a subsidiary of North China Pharmaceutical Co. Ltd. ("North China"). *See id.* While the record does not appear to show the relationship between North China and North China Group, a page at the website of North China Group asserted that North China was, as its name suggests, a subsidiary. N. China Pharm. Grp. Corp., *Company Profile*, https://web.archive.org/web/20140922190940/http://www.ncpc.com:80/en/Profile_Organization.asp

(archived Sept. 22, 2014) [https://perma.cc/8SC7-TK7N]. This would make Hebei Welcome an indirectly-owned state-owned enterprise as well.

Given that one and likely both of the Respondents are at least majority-owned by the Chinese state, the state has a direct interest in their economic welfare. Even if they were not state-owned enterprises, however, the Chinese state would still be intensely interested in their economic health. Although China has undertaken significant and meaningful reforms of its economy and industrial structure in the post-Mao era, the government's outlook remains essentially mercantilist and dirigiste. *See* Barry Naughton, *A Tarnished Triumph*, 21 China Econ. Q., Dec. 2017, at 21, 25.[2] The state makes no secret of its intention to pursue "mercantilist industrial policies designed to promote, guide and support domestic industries[.]" Office of the U.S. Trade Rep., *2017 Report to Congress on China's WTO Compliance* 6 (Jan. 2018). And "China's state-dominated financial system and the lack of rule of law means that state involvement can be pervasive, even if a firm is nominally privately owned." *Chinese Investment in the United States: Impacts and Issues for Policymakers: Hearing Before the U.S.-China Econ. & Sec. Review Comm'n*, 115th Cong. 13 (2017) (statement of Thilo Hanemann, Director and Economist, Rhodium Group).

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[2] Naughton is the Sokwanlok Chair of Chinese International Affairs at the Graduate School of International Relations and Pacific Studies at the University of California, San Diego and a leading expert on the Chinese economy.

Courts should not be required as a matter of law to ignore the possibility that a mercantilist government such as China's, when dealing with a direct contest between a local firm and a foreign firm or government, is going to view siding with its nationals as a policy imperative. To say that a government may side with its nationals is not insulting to that government; it is simply the common-sense acknowledgement of a well-known reality. As noted in a recent study of foreign states' *amicus curiae* submissions,

> some foreign nations' amicus curiae submissions may be, in essence, mercantilist. They may be motivated directly by the interests of defendants. The amicus briefs may be submitted in order to shield the foreign defendants from liability in the U.S., even if their conduct was anticompetitive. From a pragmatic perspective, fines or damages in a transnational context represent a transfer of wealth from home to a foreign jurisdiction and therefore should be avoided.

Marek Martyniszyn, *Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases*, 61 Antitrust Bull. 611, 630 (2016).

The partiality of the Ministry in this case is set forth extensively by the District Court in its Memorandum Decision and Order of Oct. 1, 2012, in which it found that "[t]he circumstances of this litigation provide ample . . . reasons to conclude that [the Ministry's statements respecting

Chinese law] are not trustworthy" and "there is no dispute that the Ministry is not impartial in this litigation." *In re Vitamin C Antitrust Litig.*, Nos. 06-MD-1738 (BMC) (JO), 2012 WL 4511308, at *3 (E.D.N.Y. Oct. 1, 2012). Indeed, the District Court found that a Ministry statement "does not read like a frank and straightforward explanation of Chinese law" but instead "reads like a carefully crafted and phrased litigation position." *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 552 (denying motion for summary judgment). Courts should of course take litigation positions into account, but should not grant them conclusive deference.

III. MOFCOM's Attempt to Explain Away Inconsistent Statements at WTO Fails

The strongest case against conclusive deference arises when the foreign government, as in this case, has made contradictory statements about its law at different times and in different fora. A rule of conclusive deference to a foreign government's representations does not resolve the question of *which* representation the court should defer to. The position of the Ministry is essentially, "Never mind what we said before; you must accept what we say *now*." This position not only violates the practical spirit of Rule 44.1, but is also contrary to established U.S. law. When a foreign government makes conflicting statements, a court is not bound to accept its most recent statement or the one offered in litigation. *See United States. v. McNab*, 331 F.3d 1228, 1242 (11th Cir. 2003).

That MOFCOM has made conflicting statements is clear; its attempt to explain away the inconsistency fails.

As discussed in the District Court's original judgment denying the defendants' motion to grant summary judgment in their favor, MOFCOM, speaking through China's Permanent Mission to the World Trade Organization (the "WTO"), had stated in WTO proceedings that it did not exercise any control over vitamin C export pricing or volume.[3] *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 532. In 2002, MOFCOM formally represented to the WTO that "[f]rom 1 January 2002, *China gave up export administration of . . . vitamin C*[.]" Council for Trade in Goods, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, WTO Doc. G/C/W/438, at 3 (Nov. 20, 2002) (emphasis added). It then noted that there were 54 products still subject to export administration and that a list of such products and the relevant measures had been provided to the WTO. *See id.* The same statement appears in the Statement by the Head of the Chinese Delegation issued nine days later. *See* Council for Trade in Goods, *Statement by Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade in Goods*, WTO Doc. G/C/W/441, at 3 (Nov. 29, 2002).

In a 2004 submission to the United States Department of Commerce in support of China's

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[3] As the Permanent Mission to the WTO is under MOFCOM, it is appropriate to attribute its statements to MOFCOM.

request to be granted market economy status under U.S. trade law, MOFCOM stated, in a *section entitled "The extent of government control* over the allocation of resources and over the price *and output decisions of enterprises," that with a* small number of exceptions, Chinese enterprises *"make their price and output decisions based on* market considerations." Ministry of Commerce of *China, Comment Letter on U.S.-China Joint* Commission on Commerce and Trade Working *Group on Structural Issues, at 8 (May 19, 2004),* https://enforcement.trade.gov/download/us-china-*jcctwg/comments/mcprc-jcctwg-cmt.pdf. According* to the submission, the exceptions were in "a very *limited number of products and services, which* are either of strategic significance or of particular *importance to the public welfare." Id. In none of* the filings of MOFCOM or the Respondents has it *been contended that the vitamin C industry is of* strategic significance to the Chinese state or of *particular importance to the public welfare of* China.

MOFCOM's attempts to explain away these statements are unconvincing. In its August 31, *2009 Statement to the District Court, MOFCOM* correctly noted that "*general descriptions* of the *current status of China's market economy [cited* by one of the plaintiffs' experts] . . . should not be *deemed as explicit or implicit statements of* China's abandonment of its limited regulatory *policies over certain designated industries* including the vitamin C industry[.]" Defs.' Decl. *Supp. Summ. J. Ex. 1, at 3, In re Vitamin C* Antitrust Litig., No. 1:06-md-01738-BMC-JO

(E.D.N.Y. Nov. 23, 2009), ECF No. 399-2. But this argument does nothing to explain away what *is* an explicit statement: the 2002 claim noted above that China "gave up export administration of . . . vitamin C."

MOFCOM's subsequent attempt to do *better in its amicus brief to the Second Circuit* fails as well. In that brief, it called attention to *the fact that the 2002 statement about giving up* export administration came in a section headed, *"Restrictions on exports through non-automatic* licensing," and asserted that this therefore means *that China was not declaring it had given up all* forms of export restrictions over vitamin C. *See Brief for Amicus Curiae Ministry of Commerce of* China in Support of Defendants-Appellants at 27, *In re Vitamin C Antitrust Litig.*, No. 13-4791, (2d Cir. Apr. 14, 2014), ECF No. 105. This argument *is, as will be shown below, frail to the point of* being disingenuous.

First, and most incredibly, *MOFCOM's amicus* brief omitted three important words that *follow the quoted language in the heading: "or other means."* Thus, the statement that China had *given up export administration of vitamin C* appeared in a section entitled, "*Any* restrictions on *exports through non-automatic licensing or other means* justified by specific product under the WTO *Agreement or the Protocol."*[4] *Council for Trade in*

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[4] The Protocol refers to China's Protocol of Accession, *i.e.*, the specific agreement under which China joined the WTO. The language "justified by specific product . . ." refers to China's obligation to provide a product-specific justification

Goods, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, WTO Doc. G/C/W/438, at 2 (Nov. 20, 2002) (emphasis added). China's statement about vitamin C was an affirmative declaration that it had no measures that would count as "any restrictions . . . through non-automatic licensing or other means."

Second, MOFCOM's argument fails even without the "or other means" language. Automatic licensing refers to licenses designed to *monitor* exports, not regulate them; in non-automatic licensing systems, by contrast, certain conditions must be met before a license is issued.[5] Non-automatic licensing is precisely the kind of regime that MOFCOM now claims existed over vitamin C exports: manufacturers would be allowed to export only if their sales contracts had been approved under the "verification and chop" system. *See* Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 5, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105.

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for any such restrictions.

[5] The distinction in the case of import licenses is explained at the website of the Office of the United States Trade Representative. *See* Office of the U.S. Trade Representative, *Import Licensing*, https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing. Although this case is about export licenses, the distinction between automatic and non-automatic, and their meaning, is the same.

Finally, a further inconsistency in MOFCOM's position is worth noting. In Section 8 of China's Protocol of Accession to the WTO, the Chinese government agreed to publish in an official journal

> by product, the list of all organizations, *including those organizations delegated such authority by the national authorities*, that are responsible for authorizing or approving imports or exports, whether through grant of licence or other approval; [and] procedures and criteria for obtaining such import or export licences or other approvals, and the conditions for deciding whether they should be granted[.]

Protocol on the Accession of the People's Republic of China, § 8(1)(a), WTO Doc. WT/L/432 (Nov. 23, 2001) (emphasis added).

Had such a notice ever been published, it would have been in the interest of MOFCOM and the Respondents to mention it at some point in these proceedings. That they have not done so strongly suggests that China in fact never published any notification stating that MOFCOM or any trade association acting by delegated authority[6] exercised any control over exports of vitamin C.

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[6] According to MOFCOM's statements in this case, that would be the Chamber of Commerce of Medicine and Health Products Importers & Exporters. *See* Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 4, *In re Vitamin C Antitrust Litig.*,

The unfortunate conclusion is inescapable: MOFCOM's representations (both affirmative and negative) to the WTO on the one hand and to the courts of the United States in this case on the other cannot both be accurate. In such circumstances, the courts have no choice but to undertake their own inquiry as best they can.

IV. MOFCOM Does Not Have "Unquestioned Authority" to Interpret Applicable Chinese Law

In its *amicus* brief to the Second Circuit, MOFCOM declared that it had "unquestioned authority to interpret applicable Chinese law." Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 14, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105. Yet it cited no authority in support of this claim. From MOFCOM's standpoint, this is understandable: it is making an assertion about Chinese law, and to provide reasons and authorities for its assertions about Chinese law is precisely what MOFCOM argues strenuously it must not be required to do. The difficulty this poses for the Second Circuit's rule of conclusive deference, however, is obvious: if conclusive deference is granted to a government

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No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105; Brief of Amicus Curiae the Ministry of Commerce of China in Support of the Defendants' Motion to Dismiss the Complaint at 7–8, *In re Vitamin C Antitrust Litig.*, No. 06-mdl-1738 (DGT) (E.D.N.Y. June 29, 2006), ECF No. 30-1.

body's assertion of its own authority, then any government body at any level can bootstrap its authority merely by claiming that such authority exists. Modern governments are complex entities, with different branches, levels, and departments often functionally independent of each other. The Second Circuit's rule opens the door to a cacophony of different interpretations, each of which must be treated as accurate with conclusive and unquestioning deference. A rule that deprives courts of the ability to examine a claim of authority cannot advance the interests of comity or justice.

Furthermore, MOFCOM's sweeping claim to "unquestioned authority to interpret applicable Chinese law" is simply inaccurate.

The authority to interpret Chinese statutory law (*falü*) is granted by China's Law on Legislation to the National People's Congress or its Standing Committee. *See* Lifa Fa (立法法) [Law on Legislation] (as amended, promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), art. 45, http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm [https://perma.cc/PVK9-9GJ6] [hereinafter Law on Legislation]. MOFCOM has no power under Chinese law to issue authoritative interpretations of statutory law.

This case does not, however, involve statutory law; it involves instead MOFCOM's claims about the content and import of MOFCOM's own ministry-level rules. The Chinese term for such rules, *bumen guizhang*, is often translated as "departmental rules." According to the Law on Legislation, departmental rules shall be for the implementation of matters covered by statutory law or various regulatory documents (the terms in question can be translated as administrative regulations (*xingzheng fagui*), decisions (*jueding*), and orders (*mingling*)) issued by China's State Council, a body superior to MOFCOM. *See id.*, art. 80. Where they do not serve the purpose of implementing such statutory law or State Council documents, departmental rules may not impair the rights or increase the duties of citizens, legal entities such as corporations, or other organizations. *See id.* In no circumstances may departmental regulations contravene superior norms such as statutory law or State Council administrative regulations. *See id.*, arts. 87, 88.

To summarize the above, MOFCOM might well issue rules in the realm of foreign trade that purport to bind exporters such as the Respondents, but whether they actually do so under Chinese law is not a simple matter. Its rules might be infirm or invalid for a number of reasons: they might impair rights or increase duties (as a mandatory price floor surely does) while not serving the purpose of implementing

statutory law or State Council administrative regulations, or they might simply contravene the provisions of superior norms. Its rules might require producers to violate a superior norm—China's Antimonopoly Law, for example—and would for that reason be invalid.[7] In no case does

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[7] For example, China's Antimonopoly Law (the "AML") prohibits agreements to fix prices or limit the quantity of goods sold—precisely the kind of agreements at issue in this case. *See* Fan Longduan Fa (反垄断法) [Antimonopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 13, http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm [https://perma.cc/6MGH-KBVF]. Article 36 of the AML forbids government administrative authorities—a term that includes MOFCOM—from abusing their authority by compelling producers to engage in activities forbidden by the Antimonopoly Law. *See id.*, art. 36. Article 37 prohibits government administrative authorities from abusing their authority by making rules that eliminate or restrict competition. *See id.*, art. 37. China's National Development and Reform Commission, a ministry-level body independent of MOFCOM, is responsible for enforcing the rules of the Antimonopoly Law relating to price cartels. *See* Wendy Ng, *The Independence of Chinese Competition Agencies and the Impact on Competition Enforcement in China*, 4 J. Antitrust Enforcement 188, 190 (2016). In the past, the NDRC has brought actions against domestic price cartels organized by trade associations, *see* Qian Hao, *Overview of the Administrative Enforcement of China's Competition Law*, *in* Procedural Rights in Competition Law in the EU and China 39, 50 (Caroline Cauffman & Qian Hao eds., 2016) ("[M]ost of the major price monopolies handled by both the NDRC and its local counterparts have been cartels arranged by trade associations."), but the source does not state whether any of the cartels purported to operate under the compulsion of another Chinese government authority.

Chinese law permit MOFCOM to be the final arbiter of the compliance of its own rules with the principles set forth in the Law on Legislation.

Finally, it is worth noting that the system of "verification and chop" described by MOFCOM in its amicus brief to the Second Circuit required the cooperation of China's General Administration of Customs ("Customs"). *Yet MOFCOM has no power to require Customs, also of full ministry rank in China's administrative structure,*[8] *to follow its orders. See* Susan V. Lawrence & Michael F. Martin, Cong. Research Serv., R41007, *Understanding China's Political System* 15 (2013), https://fas.org/sgp/crs/row/R41007.pdf ("[E]ntities of equivalent rank cannot issue binding orders to each other."). Just as MOFCOM cannot require the National Development and Reform Commission to overlook a MOFCOM-sponsored price cartel (should the former wish to break it up),[9] so it cannot force Customs to deny export permission to disfavored companies. In each case, the matter will be settled by bargaining, not law. *See* Kenneth Lieberthal, *Governing China* 189-92 (2d ed. 2004).

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[8] Customs is formally a "general administration" and as such has the same rank as a ministry such as MOFCOM. *See* Susan V. Lawrence & Michael F. Martin, Cong. Research Serv., R41007, *Understanding China's Political System* 16, Table 2 (2013), https://fas.org/sgp/crs/row/R41007.pdf.

[9] The authority of the National Development and Reform Commission in antimonopoly enforcement is discussed in footnote 7, *supra*.

None of this is to deny that it would be a daunting task for an American court to determine if MOFCOM's rules would for some reason be deemed invalid under Chinese law by a competent Chinese authority, and this brief does not purport to make such a determination in this case. What it argues instead is simply that it is entirely possible for MOFCOM's rules to be invalid within the Chinese legal system, just as it is possible for a U.S. government department or administrative agency's rules to be found invalid within the U.S. legal system. MOFCOM does not have the authority within the Chinese legal system to decide on the validity of its own measures; still less does it have "unquestioned authority to interpret applicable Chinese law."

While it is not surprising that MOFCOM's *amicus* briefs and other submissions in this case express no doubt as to the validity of MOFCOM's actions within the Chinese legal system, the fact is that they make a difficult and complex problem appear simple and straightforward. Thus, conclusive deference to MOFCOM's views is inappropriate.

V. Courts Should Not Delegate to Foreign Governments the Power to Decide the Meaning of United States Legal Terms

The key question in this case is whether a "true conflict" existed between the laws of China and the United States such that "compliance with the laws of both countries [was]. . . impossible[.]" *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,

797–99 (1993). The concern animating the "true conflict" question is one of comity:

> When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (footnote omitted).

What must be reconciled are the central concerns of *both sets of laws*: those of the United States and those of the foreign state—in this case, China. And whether there is indeed a true conflict in the sense of *Aérospatiale* and *Hartford Fire*—decisions of American courts, not foreign courts, using terms intended to be meaningful in American law—can be determined only by an examination of both sets of laws *by American courts* with a view to effectuating the values and policies embodied in such terms.

The Second Circuit impermissibly delegated this task to MOFCOM, allowing it to determine unilaterally and conclusively whether a true conflict existed, even though the Ministry of Commerce has no expertise in U.S. antitrust law or the values and policies expressed in the case law interpreting terms such as "true conflict," and even though it is not the job of China's Ministry of

Commerce—as it assuredly *is* the job of American courts—to promote those values and policies.

To be sure, American courts by the same token do not have expertise on foreign law. But somebody must decide these questions, and they are the body that has been given the constitutional and statutory authority to do so. They can decide whether a true conflict exists with foreign law in the same way that they decide other questions on which they lack expertise: by taking testimony and examining evidence. That process should certainly include listening to the views of the relevant foreign government, but it should not exclude all other kinds of evidence that might be relevant (including, as in this case, evidence that the foreign government in question made contradictory statements in the past).

VI. Conclusive Deference Is Unreasonable and Not Required by Considerations of Deference to the Foreign Policy Powers of the Executive Branch

The position of MOFCOM is clear: not just substantial deference, but conclusive obedience to its wishes is what American courts must display: "When a foreign sovereign appears in such a case to say what it demanded of a defendant, it should not be open to a district court to deny the command was given." Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 13, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105. This duty of obedience is so

strong, in MOFCOM's view, that it forbids *any* inquiry into whether the representation is, in fact, correct. More important than the search for truth is the duty not to be "disrespectful" and not to incur the "displeasure" of the Chinese government. *See id.* at 2, 13.

This is asking too much. It is the duty of American courts to dispense justice according to law as best they can, not to cater to the *amour-propre* of foreign governments, much less to pretend that foreign governments will never attempt to use the American legal system strategically—and to refuse even to consider evidence to the contrary. American courts are already familiar, for example, with the phenomenon of "blocking statutes," whereby a foreign government attempts to protect its nationals by deliberately erecting a conflicting duty. *See* Restatement (Third) of Foreign Relations Law § 442 reporters' note 4 (1987) ("Blocking statutes are designed to take advantage of the foreign government compulsion defense . . . by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities."). Accordingly, courts grant them a lower degree of deference. *See Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.29.

American courts should be similarly realistic in their approach to the declarations of foreign governments on other matters, including characterizations of foreign law. The traditional concern of comity analysis—infringement upon

the authority of the executive branch to conduct foreign relations—is not present in this case, given that the executive branch, in the person of the Solicitor General, has announced its opposition to the Second Circuit's standard of conclusive deference. *See* Brief for the United States as Amicus Curiae, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 86 U.S.L.W. 3351 (2018) (No. 16-1220).

CONCLUSION

The rule of conclusive deference endorsed by the Second Circuit prevents courts from fulfilling their fundamental mission—to arrive at an accurate understanding of foreign law—and is not supported by considerations of deference to the executive branch in foreign affairs. Accordingly, *amici* respectfully urges that the judgment below be reversed.

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March 5, 2018

No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS SAMUEL ESTREICHER AND THOMAS LEE *IN SUPPORT OF NEITHER PARTY*

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors who teach and write about international litigation, U.S. foreign relations law, and the U.S. judicial system. They have no interest in this case or the parties except in their capacities as teachers and scholars; this brief represents the individual views of *amici* and not necessarily the views of any institution with which they are affiliated. They are filing this brief in support of neither party to call the Court's attention to the continuing importance of principles of international comity in helping U.S. courts tread carefully in cases implicating U.S. relations with foreign states.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6. The parties have given consent to the filing of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit ruled below that "principles of international comity" required the district court to abstain from exercising jurisdiction in this case. *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 179 (2d Cir. 2016). In so doing, the court of appeals applied a 10-factor balancing test originated by the Third and Ninth Circuits in the late 1970s. *See id.*, at 184-85 (citing *Timberlane Lumber Co. v. Bank of Am., N.T., & S.A.*, 549 F.2d 597, 614-115 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979)). If this Court decides the court below erred by treating the Chinese government's view of Chinese law as conclusive and binding, then on remand the lower court will likely replay the *Timberlane* international comity analysis, albeit with more searching inquiry into relevant Chinese law.

International comity—according due respect to the public acts or interests of foreign sovereigns—has been a longstanding basis for judicial abstention in sensitive foreign relations cases. The role of international comity has diminished with the development of specific judicial doctrines and statutes like the Foreign Sovereign Immunities Act to mitigate the risk that litigation in U.S. courts might damage this country's relations with other nations. Nevertheless, given the breadth of U.S. courts' adjudicative jurisdiction, and the myriad ways in which litigation in the United States touches upon foreign relations concerns, principles of international comity will continue to inform judicial analysis in these sensitive cases.

This Court did not grant *certiorari* on the question whether a freestanding doctrine of international comity abstention exists. Every court of appeals to have addressed the question has answered in the affirmative. Accordingly, we submit, this Court should not resolve the question it left open in *Hartford Fire Insurance Co. v. California*, "whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. 764, 798 (1993). Should the Court nevertheless reach that issue, it might use this case as a vehicle for providing much needed guidance to the lower courts, which have developed an unpredictable, malleable 10-factor balancing test.

I. INTERNATIONAL COMITY IS AN IMPORTANT BASIS FOR JUDICIAL ABSTENTION IN SENSITIVE CASES IMPLICATING THE PUBLIC ACTS OR INTERESTS OF FOREIGN STATES.

Although the basic idea of "international comity" is simple—to accord respect to the public acts or interests of foreign sovereigns—it has three overlapping legal usages that have sown confusion in U.S. courts. First, comity is sometimes invoked as a rule of statutory construction by which "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This usage is a cousin of the presumption against extraterritoriality, which in significant part is motivated by a desire "to avoid the international discord that can result when U.S. law is applied to

conduct in foreign countries." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016). The latter usage of the term does not apply in the present case, because this Court has ruled that the Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. §§ 1-7, as amended ("Sherman Act"), applies extraterritorially to price-fixing activities abroad that affect "imports to the United States". *Empagran*, 542 U.S. at 161.

Second, comity is an umbrella term or animating principle for a number of related doctrines this Court has developed to ensure restraint or respect for foreign state parties or interests in suits in U.S. courts. For instance, this Court has recognized that "under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue" in U.S. courts. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-409 (1964). The *Sabbatino* Court also acknowledged that the "act of state" doctrine—"the principle that the conduct of one independent government cannot be successfully questioned in the courts of another"—rests upon "the highest consideration of international comity and expediency." *Id.* at 417 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918)). Other prominent doctrines implicating international comity are found in cases dealing with conflict of laws, *see Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (one country's laws "will, by the comity of nations, be recognized an executed in another"); recognition of foreign judgments in American courts, *see Hilton v. Guyot*, 159 U.S. 113, 163-4 (1895) ("The extent to which the law of one nation, as put in force within its territory . . . by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon . . . 'the comity of nations'"); and constitutional limitations on personal jurisdiction over foreign corporations, *see Daimler AG*

v. Bauman, 134 S. Ct. 746, 763 (2014) (U.S. courts' "expansive view of general jurisdiction" poses "risks to international comity").

Third, and most relevant for present purposes, various courts of appeals have recognized international comity as an independent basis for judicial abstention in sensitive foreign relations cases, as the Second Circuit did in this case. *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-1298 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613-615 (9th Cir. 1976). No federal appeals court has held that international comity cannot be the basis for abstention in appropriate cases. Although the circuits have not developed a uniform international comity analysis, it is generally agreed that U.S. courts "should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity." *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 & n.7 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983).

This Court has not decided the question "whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798 (1993). The *Hartford Fire* majority explicitly left the question open. This Court's holding in *United States. F. Hoffmann-La Roche Ltd. v. Empagran S.A.* 542 U.S. 155 (2004), did not purport to address the comity abstention question left open in *Hartford Fire*. Rather, the *Empagran* Court construed Section 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 18 Pub. L. No. 97-290, Tit. IV, 96 Stat 1246, 15 U.S.C. § 6a, to not reach "commercial activities taking place abroad, unless those activities adversely affect domestic

commerce" or "imports to the United States". *Empagran* 542 U.S. at 161. In other words, *Empagran* involved a construction of the Sherman Act's extra-territorial reach (what some call "prescriptive comity"), not the issue of whether a U.S. court having adjudicative jurisdiction should dismiss or stay a case on international comity grounds (what might be termed "adjudicative comity"). In fact, the legislative history of the FTAIA openly acknowledges that these amendments to federal antitrust laws "would have no effect on the courts' ability to employ notions of comity." H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982).

The role of international comity as a freestanding doctrine has diminished with the development of judicial doctrines (like act-of-state) and statutes developed to mitigate the risk that litigation in U.S. courts might damage this country's relations with other nations. For instance, foreign state immunity, historically the flagship issue of international comity in national courts, has been regulated by statute for the past few decades—the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Publ. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-11). Chief Justice Marshall's holding for this Court that a federal district court could not exercise "ordinary jurisdiction" over a ship alleged to be "a national armed vessel . . . of the emperor of France, *The Schooner Exchange v. McFaddon*, 8 U.S. (7 Cranch) 116, 146 (1812), was an early example of adjudicative comity. Under *The Schooner Exchange*, "foreign sovereign immunity is a matter of grace and comity on the part of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

But given the breadth of U.S. courts' adjudicative jurisdiction, and the myriad ways in which litigation

in the United States touches upon foreign relations, principles of abstention on international comity grounds in sensitive cases continue to inform judicial analysis in such cases. The availability of international comity abstention is particularly important in cases falling outside the limits of specific doctrines or statutory provisions but where, nonetheless, especially at the suggestion of the Executive Branch, foreign relations considerations call for the U.S. court to stay its hand.

II. THE LOWER COURTS WOULD BENEFIT FROM FURTHER GUIDANCE ON THE PRINCIPLES THAT SHOULD GOVERN ABSTENTION ON INTERNATIONAL COMITY GROUNDS.

Despite the importance and continuing need for a freestanding doctrine of international comity abstention, criticism of the doctrine has understandably focused on the malleable 10-factor *Mannington Mills-Timberlane* test which most of the courts of appeals, including the court below, have applied to implement it. These factors include:

> (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief

> is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue.

In re Vitamin C Antitrust Litigation, 837 F.3d 175, 184-85 (2d Cir. 2016); *see also Timberlane*, 549 F.2d at 614; *Mannington Mills*, 595 F.2d at 1297-98.

This 10-factor test is too indeterminate and gives virtually limitless discretion to lower courts to reach any desired outcome, even to the point of shirking their adjudicative responsibility. But that does not mean that this Court should throw the proverbial baby out with the bathwater. Rather, it could emphasize the most important factors in international comity analysis and require courts to engage in a principled application of those factors. This Court's iconic decision in *The Schooner Exchange* is a good place to start identifying what those factors are.

That case involved a libel filed in federal court by two American citizens on a ship in Philadelphia under Section 9 of the Judiciary Act of 1789, which provided that the district courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The American citizens claimed that they were the rightful owners of the ship which had been "seized by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French." *The Schooner Exchange*, 11 U.S. at 117 (statement of facts). They alleged that the ship had

never been taken to a French port for condemnation of title after capture as required under the maritime law of prize, an assertion this Court did not challenge.

No one timely appeared to challenge the U.S. libellants' claim of good title to the ship. Instead, the U.S. Attorney for the District of Pennsylvania appeared to make a "suggestion" to the effect that the ship was a "public vessel" of the French Emperor that had taken shelter in the port of Philadelphia during a storm. *Id.* at 117-18. The U.S. Attorney offered affidavits from the local French consul and ship's captain in support of his suggestion. *Id.* at 119.

Chief Justice Marshall, writing for a unanimous Court, held that public vessels "entering the port of a friendly power . . . are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 146. The Court thus adopted the U.S. Attorney's "suggestion"—despite the statement of the libellants to the contrary and, more importantly, despite the absence of any statement by the U.S. Attorney rebutting the libellants' factual assertion that the ship had not been condemned by a French prize court as required by the maritime law of prize.

As indicated by *The Schooner Exchange*, a critically important factor in determining whether a U.S. court should dismiss (or stay) a case implicating foreign sovereign interests is the position of the Executive Branch in the matter. Although the Government in this case did not urge this Court to decide the international comity abstention question, its briefing in support of the petitioners strongly suggests its approval of the view that international comity remains an important ground for federal courts to abstain in sensitive cases implicating foreign affairs concerns. See Br. for the United States as *Amicus*

Curiae, No. 16-1220, at 18 ("Comity-based dismissals [in Sherman Act cases] should be rare . . . But, in the United States' view, federal courts may, in extraordinary circumstances, dismiss private Sherman Act claims based on principles of comity."). The Executive Branch is the essential branch in the conduct of this nation's foreign relations, and courts should not "second-guess the executive branch's judgment as to the proper role of comity concerns" in government antitrust enforcement actions. *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990).

Another point of concern is that the 10-factor *Mannington Mills-Timberlane* test does not give adequate weight to U.S. regulatory interests in enforcing laws having an undisputed extraterritorial reach and implicating serious U.S. domestic effects from claimed international wrongdoing.

This Court has clearly held that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the *United States." Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). And it is an axiom of U.S. federal courts law that the courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). But that obligation, as Chief Justice Marshall's holding in *The Schooner Exchange* teaches, is not absolute. And despite the welter of statutes and doctrines that operationalize comity, there may be instances in which a federal court should abstain from hearing a case over which it plainly has adjudicative jurisdiction.

What might such cases be? Two examples where international comity abstention seem particularly

appropriate are when: (1) the Executive Branch appears and suggests dismissal in a private Sherman Act action, or (2) a U.S. court determines that a foreign plaintiff should first exhaust available remedies in other forums where the underlying events occurred before proceeding here, *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004), or in a lawsuit against a foreign state or official not covered by the FSIA, *cf. Samantar v. Yousuf*, 560 U.S. 305, 325-326 (2010) (noting that the FSIA "did not deprive the District Court of subject-matter jurisdiction" over a suit against a foreign ex-official but that he "may be entitled to immunity under the common law" or "have other valid defenses").

In sum, it should be emphasized that judicial abstention on international comity grounds should be exceedingly rare. For instance, if the United States, not private litigants, had brought the Sherman Act challenge in this case, a federal court should never abstain. The government's decision to bring an enforcement action "represents a determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation § 4.1, at 28 (2017).

CONCLUSION

For the reasons set forth above, this Court should not address the question it left open in *Hartford Fire* "whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. 764, 798 (1993). If it does reach that question, it might use this case as a vehicle for announcing principles of international comity abstention that U.S. courts could invoke in sensitive foreign relations cases.

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No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Where a foreign government appears in a U.S. court to explain the meaning of its own law, should the court defer to the foreign sovereign's reasonable interpretation of that law?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Ministry of Commerce of the People's Republic of China (the "Ministry," sometimes called MOFCOM) is a component of the central Chinese government and the highest administrative authority in China authorized to regulate foreign trade. The Ministry is the equivalent of a U.S. cabinet-level department. Chinese law places the Ministry in charge of foreign trade throughout the country. The Ministry accordingly formulates strategies, guidelines, and policies concerning domestic and foreign trade and international cooperation. It also drafts and enforces trade laws and regulations, and regulates markets. And contrary to Petitioners' groundless suggestion, the Ministry's authority to interpret the regulations at issue here was established below and is incontestable.

The Ministry has been actively involved in this litigation since 2005. It first presented the Chinese government's authoritative interpretation of Chinese law in 2006, when it filed an *amicus* brief in the district court. It reaffirmed its position in supplemental submissions to the district court in 2008 and 2009, and in an *amicus* brief in the court of appeals in 2014. As both courts below observed, this was "historic." Pet. App. 6a. Never before had "any entity of the Chinese Government ... appeared *amicus curiae* before any U.S. court." *Id.* at 6a n.5.

The Ministry's submissions explained the Chinese trade regulations that, at relevant times (2002–2005), required the defendant companies to coordinate their

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[1] No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. The parties have consenting to the filing of this brief.

export activities. China further made clear, in a 2014 diplomatic note to the State Department, that the Ministry spoke for the Chinese Government in this litigation.

Unfortunately, the Ministry's efforts to assist the district court in understanding the meaning of its regulations, including by explaining the economic, cultural, linguistic, and legal context in which those regulations were created, were treated with open suspicion and hostility. The district court even asserted that the Ministry's submissions reflected "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny." Pet. App. 121a. Petitioners and some of their *amici* have continued that smear campaign here.

These accusations are profoundly disrespectful and wholly unjustified. As the Second Circuit explained, the reasons the district court gave for disparaging the Ministry's submissions were ill-considered and at points "nonsensical." Pet. App. 27a. Consistent with its obligation to review *de novo* the district court's foreign-law determination, the Second Circuit re-examined the Ministry's interpretation, found it "reasonable," and therefore deferred to it. *Id.* The Ministry respectfully submits that the Second Circuit's approach and conclusions are correct. A contrary result would signal to private parties that they should follow Petitioners' lead and disparage the competence and motives of foreign sovereigns who appear in U.S. courts. It would likewise signal to foreign sovereigns that their interpretations of their own laws will not be respected here. Those signals would seriously disserve the interests of accurate adjudication and international comity, to the detriment of courts, regulators, and regulated parties around the world.

SUMMARY OF ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY HELD THAT A U.S. COURT IS BOUND TO DEFER TO A FOREIGN SOVEREIGN'S REASONABLE EXPLANATION OF ITS OWN LAW.

A. *United States* v. *Pink* held that a foreign sovereign's official interpretation of its law, offered for use in U.S. litigation, is "conclusive." 315 U.S. 203, 218–20 (1942). *Pink*'s holding is not narrowly confined to its facts; instead, as the United States previously told this Court, *Pink* established that "American courts are obligated to accept [a foreign sovereign's legal] statement at face value" unless it is facially ambiguous, inconsistent, or incredible. Br. of United States as *Amicus Curiae* at 23, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1985) (No. 83-2004) (*Matsushita* U.S. Br.). In *Pink*, it was enough that *some* evidence supported the foreign sovereign's interpretation, even though the New York courts had held that the voluminous record as a whole supported a different interpretation.

This Court's other decisions have similarly relied on foreign governments' explanations of their own law, submitted (as here) through *amicus* briefs. The courts of appeals, too, have consistently recognized that deference is warranted to a foreign government's plausible interpretation of its own laws. They have thus declined to defer where a foreign governmental body does not appear before the court or its interpretive authority is unclear, or where deferring to a changed interpretation on appeal would disturb the finality of the judgment. Nothing of the kind occurred here. The Ministry presented a single, unchanging position throughout this litigation.

B. Deference enhances the accuracy of U.S. courts' foreign-law determinations. The tools, doctrines, and intuitions that serve American judges so well in interpreting U.S. law are frequently unhelpful or even misleading when it comes to foreign law. Plain-language analysis of translated materials is treacherous, and may not accord with foreign interpretive principles. Secondary sources may not exist in English. And expert testimony frequently comes with a partisan spin.

Accordingly, it is only logical to regard a foreign sovereign's official and reasonable interpretation of its own law as "conclusive." The district court's analysis here vividly illustrates the dangers of a contrary approach; the court attempted to decipher the "plain language" of translated regulations, overlooking that Chinese regulatory regimes rely heavily on other types of material and use terms that might seem ambiguous or euphemistic to an English-speaker schooled only in American law. This misguided approach led the district court to accuse the Chinese government of attempting to mislead the court, understandably prompting a diplomatic protest.

Petitioners and the Solicitor General suggest that foreign governments may mislead U.S. courts to protect foreign interests, but they can identify no example of that happening in this Court or any other. Notably, the Ministry adhered to its interpretation here even when the United States (among others) used the Ministry's submissions in this case to support its claims that China's trade practices violated WTO standards. That occurrence illustrates why foreign sovereigns are unlikely to espouse positions in U.S. courts they do not believe. The positions they take here, in public filings, will have consequences in domestic settings and around the world.

Deference is also critical to international comity. Rejecting a foreign sovereign's explanation of its own law can imply only two things: that a U.S. court knows a country's laws better than its own government, or that the foreign government is not being candid. Both are profoundly disrespectful. The Court should not adopt a rule that encourages litigants to accuse foreign governments of incompetence or deceit, and encourages courts to reject foreign sovereign's views in precisely those cases that are important enough for them to participate directly.

C. Federal Rule of Civil Procedure 44.1 did not discard the rule of deference to foreign sovereigns. As the Solicitor General correctly acknowledges, there is no conflict between a rule of deference and Rule 44.1's text. Nor is there a conflict with Rule 44.1's goals of (a) making for ign-law determinations questions of law, not fact, and (b) removing limitations on the materials a court can consider. In domestic contexts, courts regularly grant deference on questions of law, and consider extrinsic materials in applying deference doctrines. So too here.

Although the parties agree that domestic deference doctrines should not be transplanted wholesale into the foreign-law context, analogies may be illuminating. Like the Seventh Circuit, the Ministry believes it would be inappropriate for courts to afford greater deference to executive-agency interpretations of domestic statutes than to foreign government interpretations of foreign law. When U.S. courts decline to defer to a foreign sovereign's interpretation of foreign law, they risk applying a rule that has never before existed and applies to no one else, thereby imposing conflicting legal obligations on the parties before them. And they risk international discord as a result.

D. The Solicitor General's newly minted standard—in which any number of "circumstances" dictate the amount of deference due, if any—will not aid courts in resolving difficult issues of foreign law, and will not serve the interests of comity. Indeed, although the Solicitor General asserts that his approach will "ordinarily" afford "substantial weight" to a foreign government's interpretation, that assurance is impossible to square with his position that a court should resolve "a disputed question of foreign law ... in the same manner as a court facing any other unsettled legal question." The Court should not adopt that unprecedented approach.

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO THE MINISTRY'S REASONABLE EXPLANATION OF CHINESE LAW.

A. The Second Circuit carefully examined the Ministry's submissions in context and in light of underlying materials. It also carefully explained the district court's key analytical errors—which together produced a "nonsensical" reading of Chinese law. Yet Petitioners claim the Second Circuit blindly deferred to the Ministry and but for that deference, the Second Circuit would have embraced the district court's construction. That is a strawman—the Second Circuit said nothing of the kind.

The district court's criticisms of the Ministry's position were unfounded. The Ministry provided a clear, detailed, and cohesive interpretation of relevant Chinese law. The district court appeared troubled that aspects of the regulatory system were not fully spelled out in positive enactments, but that is typical of Chinese law. Nor did the Ministry fail to distinguish between the 1997 and 2002 regulatory regimes; rather, it carefully explained that the later regime rested on

the same basic concept as the earlier one, but was implemented differently.

The Ministry's position here is also fully consistent with China's statements to the WTO. Those statements referred to the pre-2002 system of export quotas and licenses, but *not* to mechanisms such as the verification-and-chop system, pursuant to which (before 2008) certain chambers of commerce were granted implementing authority to coordinate export prices, and thereby minimize export dumping issues that Chinese manufacturers might encounter. Indeed, the United States later *invoked the Ministry's filings in this very case* to argue to the WTO that China controlled export prices in precisely this way, including during the 2002–2005 period, and the WTO agreed. The district court simply misread China's reference to "export administration," giving that term a construction never adopted by the trade specialists in the WTO proceedings—an error Petitioners repeat here.

B. There is no merit to the suggestion that the Ministry lacks authority to interpret the regulatory materials at issue. In 2001, China's State Council promulgated rulemaking procedures that empower the Ministry (and other Chinese agencies) to make and interpret its own regulations. The Ministry exercised that authority and, moreover, speaks for the People's Republic of China here.

ARGUMENT

I. U.S. COURTS ARE BOUND TO DEFER TO A FOREIGN SOVEREIGN'S REASONABLE EXPLANATION OF ITS OWN LAW.

A. *Pink* Held That A Foreign Sovereign's Explanation Of Its Own Law Is Conclusive.

This Court has already held, on materially indistinguishable facts, that a foreign government's explanation of its own law, provided for use in U.S. litigation, is "conclusive." *Pink*, 315 U.S. at 218–20. That holding, which the Second Circuit followed below, is fully supported by other decisions of this Court and the courts of appeals, and should be sustained.

1. *Pink* held that an official Soviet declaration explaining the "intended effect of the Russian decree nationalizing [Russian] insurance companies" after the Russian Revolution was "conclusive" of the decree's meaning under Russian law. *Id.* at 218–20 (footnote omitted). As the Solicitor General previously told this Court, *Pink* establishes that "[o]nce a foreign government presents a statement dealing with subjects within its area of sovereign authority ... American courts are obligated to accept that statement at face value; the [foreign] government's assertions concerning the existence and meaning of its domestic law generally should be deemed 'conclusive.'" *Matsushita* U.S. Br. at 23 (quoting *Pink*, 315 U.S. at 220). Only "[p]lainly ambiguous," "internally inconsistent," or facially "incredible" assertions do not warrant deference. *Id.*

The Solicitor General has now flipped positions and, like Petitioners, argues that *Pink* turned on "unusual" and distinguishable facts. SG Br. 27–29; Pet. Br. 39–41. They argue that (i) "a wealth of record evidence ...

confirmed" the Soviet interpretation; (ii) the interpretation came "in response to an explicit invitation from the U.S. Executive Branch"; and (iii) this Court first found "that the Commissariat had power to interpret Russian law." Pet. Br. 41. These claims are unavailing.

First, Petitioners and the Solicitor General misunderstand the facts of *Pink*. The New York courts had held—based on expert testimony, government documents, court decisions, and academic writings, see *Moscow Fire Ins. Co.* v. *Bank of N.Y. & Tr. Co.*, 294 N.Y.S. 648, 683 (N.Y. Sup. Ct. 1937)—that the nationalization decrees "were not intended to have effect here." *Moscow Fire Ins. Co.* v. *Bank of N.Y. & Tr. Co.*, 20 N.E.2d 758, 767 (N.Y. 1939), *aff'd by an equally divided court*, 309 U.S. 624 (1940). "Subsequently to the hearings in that case," the United States obtained and submitted the official Soviet declaration. *Pink*, 315 U.S. at 218. When the issue arose again in *Pink*, on the same record, *id.* at 216–17, this Court deemed the declaration "conclusive." It did so even though the declaration contradicted the New York courts' holdings based on "all the evidence in the voluminous record," which this Court "d[id] not stop to review." *Id.* at 218.

Thus, *Pink* did not defer to the Soviet declaration *because* it was supported by the entire record (Pet. Br. 41; SG Br. 10–11, 28–29); it deferred *even though* the lower courts thought the record, on balance, supported the opposite conclusion.

Second, although U.S. courts previously obtained foreign legal interpretations "through official diplomatic channels" (SG Br. 28; Pet. Br. 41), that practice was discontinued 40 years ago at this Court's suggestion, with the State Department's concurrence. See Kristen E. Eichensehr, *Foreign Sovereigns As Friends*

of the Court, 102 Va. L. Rev. 289, 299 (2016). "[F]oreign governments [now] communicate their views to the judicial branch through ... the filing of formal briefs," *id.*, as the Ministry did here.[2]

Moreover, China *did* act through diplomatic channels. After the district court ruled, the Chinese Embassy sent a diplomatic note to the State Department highlighting that "China has attached great importance to this case" and reiterating that the Ministry's submissions had correctly "described China's compulsory requirements concerning vitamin C exports." JA782–84. That note was before the Second Circuit, just as the Soviet declaration was before the New York courts in *Pink*. 315 U.S. at 220.

Third, Petitioners now contend (at 42–43) that *Pink* turned on a "threshold" finding that the Soviet declaration was issued pursuant to the Commissariat's power to interpret law, and that the Ministry has not shown equivalent authority here. But insofar as the lower courts made no such formal finding, that is because Petitioners never raised this point below. See *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances ... we will not entertain arguments not made below."). Regardless, MOFCOM's power to authoritatively interpret the regulatory materials at issue here is confirmed by the record, by the diplomatic note, and by Chinese statutory law. See *infra* p. 32.

This case is on all fours with *Pink*. In both cases, a foreign governmental department issued a statement for use in U.S. litigation regarding the specific issue

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[2] Nor was the Soviet interpretation "akin to" a certified question to a state high court because it was obtained diplomatically. SG Br. 28. Certified questions are issued by courts; the *Pink* declaration was obtained by the United States, a litigant.

being litigated; its authority to speak on behalf of the foreign nation was beyond dispute; and there was other evidence of foreign law whose import was disputed. The Second Circuit correctly followed *Pink* by deferring to the Ministry's reasonable interpretation of the rules that the Ministry and the relevant chamber of commerce (acting under the Ministry's direction) made, implemented, and enforced.

2. Contrary to Petitioners' (at 29) and the Solicitor General's (at 20–21) claims, *Fremont* v. *United States* further supports deference here. 58 U.S. (17 How.) 542 (1854). *Fremont* concerned the validity of a claimant's title to California land, arising from a pre-annexation grant by the Mexican government. The court noted that in similar cases it had considered a variety of sources to determine foreign law. *Id.* at 557. There was no question of deference because no official foreign interpretation was proffered. The Court emphasized, however, that it "could not, without doing injustice to individuals, give to the Mexican laws *a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution.*" *Id.* at 561 (emphasis added). The Court thus declined to impose preconditions to the vesting of title that Mexican "regulations for granting lands" seemed to require, because title "would have been regarded as vested and valid by the Mexican authorities" regardless. *Id.* at 561–62. *Fremont* thus demonstrates this Court's practice of *accepting* a foreign government's understanding of foreign law even where a U.S. court writing on a blank slate might reach a different conclusion.

3. This Court's more recent decisions have similarly relied on foreign governments' explanations of their own law. In *Hartford Fire Insurance Co.* v. *California*,

this Court (while disagreeing with the United Kingdom's ultimate policy recommendation) accepted at face value the United Kingdom's explanation of what British antitrust law did and did not require. 509 U.S. 764, 798–99 (1993). Similarly, *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.* relied on "the United Kingdom's own filings" and diplomatic notes to establish the "United Kingdom['s] ... authority over the BVI's statutory law," and thus the citizenship of BVI corporations. 536 U.S. 88, 96–97 (2002). And *Abbott* v. *Abbott* relied on "a Chilean agency['s]" explanation to hold that Chilean law created a "joint" or "shared" right to determine a child's place of residence. 560 U.S. 1, 10 (2010).

Even now, this Court has *amicus* briefs before it in *United States* v. *Microsoft* from several foreign authorities, making arguments based on foreign law. *E.g.*, European Commission Br. at 8–16, *United States* v. *Microsoft*, No. 17-2 (Dec. 13, 2017); U.K. Gov't Br. at 5–6, *id.* These authorities are surely interested in the case's outcome and effects on their citizens. But no one would think these submissions should be disregarded because of those interests, or on the theory that U.S. courts better understand European privacy law or British surveillance powers.

4. Though they have used varying formulations, the courts of appeals have consistently concluded that strong deference to appearing foreign sovereigns' official interpretations of foreign law is warranted.

In *In re Oil Spill by the Amoco Cadiz*, France was a plaintiff seeking recovery from Amoco for a massive oil spill; a key issue was whether a French statute imposed liability for the clean-up costs at issue. 954 F.2d 1279, 1289, 1311 (7th Cir. 1992) (per curiam). The statute was not clear, and "[e]ach side presented an expert of the highest skill and repute." *Id.* at 1312. It

was enough, however, that France's interpretation was "plausible": "A court of the United States owes substantial deference to the construction France places on its domestic law." *Id.* The Seventh Circuit thus declined to "decide whether [France's] understanding of the law is correct," and deferred to it. *Id.*

In *Access Telecom, Inc.* v. *MCI Telecommunications Corp.*, the Fifth Circuit generally embraced *Amoco Cadiz*'s approach. 197 F.3d 694, 714 (5th Cir. 1999). It nonetheless declined to follow the guidance stated in a Mexican government circular because the Mexican agency was "not before the court"; its interpretive authority was unclear; and "[m]ore importantly" the circular pre-dated a significant change in law. *Id.*

In *Richmark Corp.* v. *Timber Falling Consultants*, the defendant, a company incorporated in China and "an arm of the PRC government," resisted discovery because its financial information "was classified a state secret." 959 F.2d 1468, 1471–72 (9th Cir. 1992). The company produced a letter from the "arm of the State Council ... in charge of overseeing [its] operations" confirming this interpretation. *Id.* at 1472. The Ninth Circuit "accept[ed] as valid the [Chinese] letter interpreting the State Secrets Act," explaining that a U.S. court has "neither the power nor the expertise to determine for ourselves what PRC law is." *Id.* at 1474 & n.7. The court then balanced China's "admitted interest in secrecy" against the plaintiffs' interests in disclosure to determine whether discovery was appropriate under U.S. law. *Id.* at 1474.

United States v. *McNab*, which Petitioners and the Solicitor General invoke, is more about finality than deference. 331 F.3d 1228 (11th Cir. 2003). The defendants were prosecuted under the Lacey Act for importing lobsters taken in violation of Honduran law. *Id.* at 1232. "Throughout the investigation and trial ...

both the government and the district court relied upon the Honduran officials' verification of the Honduran laws." *Id.* The Eleventh Circuit said the district court *correctly* deferred to that initial interpretation: "Among the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country.... The court reasonably may assume that statements from foreign officials are a reliable and accurate source ...." *Id.* at 1241. On appeal, however, Honduras filed a brief that the panel majority described as asserting for the first time that the Honduran regulations were invalid or had been retroactively repealed. *Id.* at 1240 & n.23.[3] The court declined to upset the convictions on this basis, ruling that it would not substitute deference for the first opinion with deference for the second because there "must be some finality with representations of foreign law." *Id.* at 1241 & n.25. Here, the Ministry's position has never varied.

In *McKesson HBOC, Inc.* v. *Islamic Republic of Iran* (Pet. Br. 32; SG Br. 19), no instrumentality of the Iranian government offered an official interpretation of Iranian law, and deference was never invoked. 271 F.3d 1101 (D.C. Cir. 2001). Rather, the meaning of Iranian law was litigated through expert testimony. *Id.* at 1108–09. Thus, when the D.C. Circuit concluded that Iran's evidence did not establish the categorical legal rule Iran's U.S. counsel asserted, it was *not* refusing to defer to an official interpretation; it merely refused to credit a party's experts. *Id.* at 1109; see Pet. for Certiorari at 24–25, *Islamic Republic of Iran* v. *McKesson HBOC, Inc.*, 537 U.S. 941 (2002) (No. 01-

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[3] A dissent contended that the appellate *amicus* brief was the only official governmental statement presented. 331 F.3d at 1247.

1521) (arguing Iran was entitled to summary judgment because its experts' "affidavits and legal opinions" were "unrebutted").

B. Deference Serves The Interests of Accuracy and International Comity.

Deference serves two crucial values: (1) it enhances the accuracy of the resulting legal determination, and (2) it furthers international comity. And deference does *not* surrender U.S. prerogatives to foreign nations. As *Pink* emphasized, whether foreign law should supply all or part of the rule of decision is a domestic-law matter. 315 U.S. at 221. The United States is free, for example, to establish endangered-species protections that do not incorporate foreign law. Cf. *McNab*, 331 F.3d at 1236. But where the laws of the United States do incorporate foreign-law standards, its courts should defer, in all but the most extraordinary cases, to a foreign sovereign's official interpretation of those standards.

1. Deference enhances accuracy. U.S. judges are "likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not." *Bodum USA, Inc.* v. *La Cafetiere, Inc.*, 621 F.3d 624, 638–39 (7th Cir. 2010) (Wood, J., concurring). Some foreign laws will be the subject of analysis and explanation in English-language materials, but many others will not. Parties can offer expert testimony, but that is expensive and often "adds an adversary's spin." *Id.* at 629 (majority op.). It is thus "logical" to defer to a foreign sovereign's statements, which a "court reasonably may assume ... are a reliable and accurate source." *McNab*, 331 F.3d at 1241. And deference is "particularly important" where there are "stark

differences" between the foreign and U.S. legal systems. Pet. App. 29a.

Petitioners repeatedly invoke the need for accuracy (at 27–33), but ignore the risk that a weak or indeterminate deference rule will leave U.S. judges prone to fall back on familiar American legal doctrines or intuitions that may be an unreliable compass in foreign waters. See *Bader* v. *Kramer*, 484 F.3d 666, 670 (4th Cir. 2007) (reliance on the "plain and ordinary meaning" of foreign law is "problematic" because it can produce a conclusion "divorced from that term's meaning in the law of the [foreign] country"); *Whallon* v. *Lynn*, 230 F.3d 450, 456 (1st Cir. 2000) ("Care must be taken to avoid imposing American legal concepts onto another legal culture.").

The district court's analysis here illustrates these perils. The "Chinese legal- and economic-regulatory system" is "unique and complex": "[T]he Chinese government [] frequently governs by regulations promulgated by various ministries"; "private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents"; and "an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law." Pet. App. 29a (omission in original). And Petitioners offered no expert evidence supporting their interpretation. *Id.* at 59a n.5.

The district court thus embarked on a solo mission to interpret the Chinese regulatory regime. It rejected the expert testimony offered by Respondents, and declined to hear argument from any party at summary judgment. It then pursued a "plain language" review of Chinese law, Pet. App. 97a, without asking whether a Chinese lawyer would do the same. It relied on a series of unsupported assumptions about whether and

how Chinese law could "compel[]" anticompetitive conduct, which the court of appeals correctly rejected as illogical. *Id.* at 30a–32a. This analysis led the court to accuse the Chinese government of intentional deception. *Id.* at 120–21a ("The 2009 Statement does not read like a frank and straightforward explanation of Chinese law.... [T]he Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny"). There was nothing "respectful" (Pet. Br. 4) about this approach, and nothing reliable about it either.

Petitioners say (at 34–35) it is "incoherent" to afford greater deference when a foreign sovereign actually appears before a U.S. court. The courts of appeals disagree. Compare *Amoco Cadiz*, 954 F.2d at 1312 (deference is owed even if "the interpretation may occur in (or in anticipation of) litigation"), with *Access Telecom*, 197 F.3d at 714 (no deference where, inter alia, Mexican agency was "not before the court"). So does the Solicitor General, who acknowledges that a foreign government's direct participation ensures that the court receives an interpretation grounded in the specific context of the dispute. SG Br. 25. And participation permits the court to engage directly with counsel for the foreign sovereign, including by posing questions at oral argument.[4]

Petitioners and their *amici* raise the specter of a foreign sovereign misleading a U.S. court to protect foreign interests (Pet. Br. 36; SG Br. 25), but they cannot

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[4] The Solicitor General says (at 24) the Second Circuit's description of the Ministry's submission as "a sworn evidentiary proffer" was "inapt," but the Ministry submitted a sworn declaration authenticating the underlying materials. Regardless, whether a foreign submission is "sworn" is not decisive; what matters is whether it presents an official, authoritative interpretation.

identify any instance of this happening even though decisions like *Pink* and *Amoco Cadiz* have long been on the books. Little wonder. Foreign governments are not frequently parties in U.S. courts, and when they are, U.S. law usually predominates, cf. *RJR Nabisco* v. *European Cmty.*, 136 S. Ct. 2090 (2016), even if foreign law plays some role, *e.g.*, *Amoco Cadiz*, 954 F.2d at 1289.

Moreover, foreign governments have strong incentives to accurately explain their laws to U.S. courts. Because U.S. court filings are public, foreign governments know their statements will endure beyond the case at hand, and may have ramifications in their home courts or international tribunals. This very case provides an exemplar: The United States (along with the European Union and Mexico) cited the Ministry's filings as supporting a WTO complaint against China. *Infra* p. 30. And if a foreign government were ever to offer a facially incredible, inconsistent, or wholly unsupported interpretation, neither *Pink* nor the decision below would require deference. Pet. App. 25a & n.8; *supra* p. 8.

2. Deference also serves important international comity principles. As just explained, deference rests on the premise that foreign sovereigns will accurately describe their law to U.S. courts. The Court should not adopt a rule that encourages lower courts to decide "whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith." *Zschernig* v. *Miller*, 389 U.S. 429, 434 (1968) (cautioning against such inquiries). Foreign sovereigns will have little interest in participating in U.S. litigation if their motives inevitably will be demeaned. The result of adopting Petitioners' standard would be to deprive the courts of valuable

guidance in many cases, and to create needless international friction in others.

The Solicitor General disputes that these consequences will follow, since "reject[ing] a foreign government's characterization of its laws does not thereby accuse the foreign government of misrepresenting *the pertinent facts*." SG Br. 24 (emphasis added). But such a rejection necessarily implies that the foreign government is either misrepresenting *the pertinent law* or is so ignorant of its law that an American judge knows better. Neither suggestion promotes comity. Cf. Br. for Australia, Canada, and United Kingdom as *Amicus Curiae* at 9–10, *Matsushita*, 475 U.S. 574 (urging that ignoring *Pink* and allowing a U.S. court to adjudicate the veracity of a foreign sovereign's legal statement "would be an unacceptable intrusion into [its] sovereignty").

3. Some *amici* contend that strong deference would "distort" the "holistic balancing" test this Court has applied to determine the effect of foreign law in a variety of contexts. *E.g.*, U.S. Chamber of Commerce Br. 3, 11; see also Am. Antitrust Inst. Br. 4. These arguments confuse two separate issues: (a) how to determine the *content* of foreign law; and (b) once that content is determined, what *effect* foreign law should have in U.S. courts. See *Pink*, 315 U.S. at 220–21 (explaining that these are "distinct matter[s]"). The latter question, emphasized by these *amici*, is beyond the scope of the question presented. Likewise, the "weighty separation-of-powers concerns" in *Pink* (Pet. Br. 41) influenced the analysis of whether U.S. courts should give

effect to the Russian decree, not the antecedent determination of its Russian-law meaning. 315 U.S. at 221–34.[5]

Here, after properly deferring to the Ministry's submissions, the Second Circuit turned to Sherman Act precedents to decide whether dismissal was required as a matter of comity. Pet. App. 12a–18a, 33a–38a. The court's answer was yes, and this Court declined to review whether comity is an appropriate basis to dismiss a Sherman Act claim. Pet. i. Thus, U.S. law ultimately controlled this case by determining the effect of Chinese law on the outcome.

C. Neither Rule 44.1 Nor Domestic Deference Doctrines Are Relevant Here.

1. Petitioners and the Solicitor General spill much ink arguing that the decision below—and *Pink*, for that matter—is inconsistent with Federal Rule of Civil Procedure 44.1. Not so. Rule 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source," and the resulting decision is "a ruling on a question of law." Fed. R. Civ. P. 44.1. As the Solicitor General concedes (at 17), the Rule says nothing about deference to foreign sovereigns or the scope of a court's discretion in reaching a substantive determination of foreign law. Contra Pet. Br. 31, 33. And there is no suggestion that the Rules

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[5] Thus, *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), does not counsel against deference. *Contra* U.S. Chamber Br. 12–13. There, the Court accepted that a Cuban bank was "a separate and distinct juridical entity" from the Cuban government under Cuban law, but applied international and U.S. law to determine "the effect to be given to Bancec's separate juridical status" for FSIA purposes. 462 U.S. at 616 n.3, 619, 621. As in *Pink*, the Court accepted that Cuban law had the *meaning* asserted by Cuban officials, and looked to U.S. law to determine the *effect* of that foreign-law conclusion.

Committee intended to alter or abrogate *Pink* in any way. The Second Circuit rightly found no conflict between Rule 44.1's procedures for determining foreign law and *Pink*'s rule of deference. Pet. App. 22a; cf. *Pink*, 315 U.S. at 220–21 & nn.4–5 (applying New York's procedural rules on how a court may receive evidence of foreign law).

Nor is there any conflict between *Pink*'s deference rule and Rule 44.1's purposes of (i) establishing that foreign law's meaning is a question of law, not fact, and (ii) removing limitations on the materials a court may consider. See Pet. Br. 28, 30–31; SG Br. 14–16. The "interpretation" of a federal statute is equally "a question of law," *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 356 (1991), and yet courts routinely defer to agency interpretations of those statutes, *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2124–25 (2016). And the Second Circuit made clear that *Pink*'s deference rule does not prevent a court from considering "*any* relevant material or source." Pet. App. 12a, 22a (emphasis added); see *Pink*, 315 U.S. at 221 & n.5.

2. The parties generally agree that domestic deference doctrines do not govern here.[6] SG Br. 19–20; Pet. Br. 47–55; Resp. Br. 31–32. But Petitioners draw the wrong lesson from that fact, arguing there is no basis to "privileg[e] the representations of foreign governments" over those of domestic government bodies. Pet. Br. 47–48. That overlooks critical differences. U.S. courts lack the expertise to decipher foreign law, and thus risk reaching an erroneous interpretation that—because it does not actually alter foreign law in non-U.S. applications—imposes inconsistent legal obligations on regulated parties. See *Richmark*, 959 F.2d at

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[6] Petitioners' lengthy argument (at 48–55) that "the *Chevron* doctrine cannot be sensibly applied" here is thus beside the point.

1474 n.7 (court has no "power [ ]or ... expertise to determine for ourselves what PRC law is"). Nor can such an error be rectified through remand to a domestic agency or congressional intervention.

Another telling difference is that a court's refusal to defer to a federal or state agency will not cause an international incident. Rejecting a foreign sovereign's interpretation of foreign law can have just that result. The Chinese Government has already protested the district court's disrespectful treatment of the Ministry in this case. JA782–84. Deference here is thus supported by comity concerns that simply do not exist in the domestic arena. See *Amoco Cadiz*, 954 F.2d at 1312 ("Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable.").

D. The Solicitor General's Position Is Hopelessly Indeterminate.

Since abandoning its recognition that *Pink* provides the standard of deference here, *supra* p. 8, the United States has searched in vain for a clear and consistent position. Although the Solicitor General now says (at 19) that domestic-deference "analogies are generally unhelpful," the Government argued in *McNab* that *Skidmore* deference was the proper "analog[ue]." Brief in Opposition at 17–18, *McNab* v. *United States*, No. 03-622 (Dec. 29, 2003) (*McNab* Opp.); but see SG Br. 21 n.3. At the certiorari stage in this case, the Government accepted that the Second Circuit's formulation was "not necessarily ... problematic." Br. for United States as *Amicus Curiae* at 9. Now the Solicitor General attacks the Second Circuit's "rigid" standard (at 22), but declines to offer any "formula or rule" for deference. He instead posits numerous (non-exhaustive) "circumstances" that are "relevant," suggests "the ap-

propriate weight in each case will depend on the circumstances," and opines that a court should resolve "a disputed question of foreign law ... in the same manner as a court facing any other unsettled legal question." SG Br. 9, 16, 19–20, 21; see also Pet. Br. 54–55.

The Court should reject this invitation to overturn every extant standard and leave the lower courts with none. "[O]pen-ended balancing tests[ ] can yield unpredictable and at times arbitrary results," *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1392 (2014), and that caution is clearly apt here. Never before have U.S. courts reviewed *de novo* a foreign sovereign's interpretation of its own laws. Never before has that been thought desirable. That standard would not mirror past practice, and it would not mirror international practice, under which, for example, "any [WTO] Member can reasonably expect that considerable deference be given to its views on the meaning of its own law."[7] And it is a recipe for chaos and unfair surprise—one-off judicial decisions that do not reflect the actual law of any foreign jurisdiction, impose inconsistent legal obligations on private parties, and give rise to unwarranted diplomatic friction.

There is no need for such experimentation. *Pink* held long ago that a foreign sovereign's reasonable explanation of its own law is conclusive of the foreign-law question. That rule is workable, supported by strong policy considerations, consistent with long-

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[7] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R ¶ 7.19 (adopted Jan. 27, 2000), https://www.wto.org/english/tratop_e/dispu_e/wtds152r.pdf. The United States advocates this "considerable deference" standard in its own WTO submissions. *E.g.*, Second Written Submission of the United States, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221, at 3 (Mar. 8, 2002), https://goo.gl/bnBYdN.

standing practice, and unaffected by Rule 44.1. The Second Circuit's holding was correct.

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO THE MINISTRY'S REASONABLE INTERPRETATION OF CHINESE LAW.

A. The Second Circuit Properly Determined That The Ministry's Explanation Of Chinese Law Was Reasonable.

1. Petitioners paint the Second Circuit's standard as requiring blind deference to foreign sovereign interpretations in all cases and without regard to other evidence. Pet. Br. 22–23, 26; see SG Br. 22. Not so. The Second Circuit recognized that it could "consider any relevant material or source, including the legal authorities supplied by the parties on appeal." Pet. App. 12a. Even after receiving a foreign sovereign's submission, a court "must still evaluate the relevant source material within the context of each case." *Id.* at 23a. If "there is no documentary evidence or reference of law proffered to support a foreign sovereign's interpretation of its own laws, deference may be inappropriate." *Id.* at 25a n.8; see SG Br. 22 n.4. At bottom, deference is proper only if the foreign sovereign's explanation is "reasonable under the circumstances." Pet. App. 25a. That is a sound and fair restatement of *Pink*'s holding.

2. In applying this standard, the Second Circuit paid "careful attention" to the Chinese regulations at issue and the facts surrounding their application. Pet. App. 27a–33a. In particular, it observed that, "[t]he 2002 Notice, *inter alia*, demonstrates that from 2002 to 2005 ... Chinese law required Defendants to participate in the PVC regime in order to export vitamin C. This regulatory regime allowed vitamin C manu-

facturers the export only of vitamin C subject to contracts that complied with the 'industry-wide negotiated' price." *Id.* at 27a. The court said that, by itself, the term "industry-wide negotiated" might be ambiguous, but pointed out that it would be "nonsensical" to require regulated parties to comply with such a "minimum price point if there were no directive to agree upon such a price"; the court thus found reasonable the Ministry's explanation that "members of the regulated industry were required to negotiate and agree upon a price." *Id.* at 27a–28a.

The court similarly observed that "on their face the terms 'industry self-discipline,' 'coordination,' and 'voluntary restraint'" could imply a lack of compulsion, but accepted as reasonable the statement that setting prices was mandatory, in light of the underlying materials and the Ministry's explanation of the trade regulations it had adopted. See Pet. App. 28a (Second Circuit stating that "these are terms of art within Chinese law connoting the government's expectation that private actors actively self-regulate to achieve the government's policy goals"); JA138, 248–49. It was in this context that the Second Circuit said a "court [must] not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, *even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system*." Pet. App. 26a (emphasis added); SG Br. 22 (omitting the italicized language); Pet. Br. 50 (same). The point was not that a court must close its eyes to extrinsic materials; it was that a U.S. court must remain keenly aware of its own limitations as a foreign-law interpreter.

The Second Circuit then highlighted three key errors committed by the district court. "First, [the district

court] determined that whether Chinese law compelled Defendants' anticompetitive conduct depended in part on whether Defendants petitioned the Chinese Government to approve and sanction such conduct." Pet. App. 30a. This was error because the *reason* for the Chinese legal requirements is both irrelevant to their existence and cannot be questioned under the act-of-state doctrine. *Id.* at 31a. "Second, it relied on evidence that China's price-fixing laws were not enforced to conclude that China's price fixing laws did not exist." *Id.* at 30a. This too was error, because it "confuses the question of what Chinese law required with whether the vitamin C regulations were enforced." *Id.* at 32a.[8] "And third, it determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict." *Id.* at 30a. In fact, a true conflict exists whenever it is impossible to comply with both nations' laws, which is the case here. *Id.* at 32a–33a.

3. Petitioners do not attempt to defend these errors. They ignore them, and instead quote—five times—the Second Circuit's observation that, had the Ministry not appeared in the litigation, the district court's approach "would have been entirely appropriate." Pet. App. 30a n.10. Petitioners attempt to spin this into a "concession" that the Second Circuit's decision was "[b]ased solely on the standard of 'binding deference'

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[8] The Second Circuit was clearly correct. We do not decide whether theft is prohibited by counting shoplifting incidents. Stealing is illegal, yet it occurs frequently. *Contra* Pet. Br. 10–11. Indeed, Petitioners quote the head of the Vitamin C Subcommittee urging "government departments to assist chambers of commerce in asserting their authority, so that [the chambers] can punish [noncompliant] companies." *Id.* at 12 (first alteration in original). This shows not that compulsion was absent, but that enforcement was challenging.

that it imposed." Pet. Br. 58–59. Not so. The Second Circuit determined correctly that the district court adopted a "nonsensical" interpretation of Chinese law. It simply noted *hypothetically* that if the Ministry had not appeared, the district court's *approach* of "attempt[ing] to parse ... China's complex vitamin C market regulatory framework" would have been "appropriate." Pet. App. 29a–30a & n.10. The district court's erroneous *conclusions* received no blessing.

4. The district court also offered misguided reasons for rejecting the Ministry's interpretation.

First, the district court criticized the Ministry's 2009 statement as "undeserving of deference" because the court believed it lacked citations. Pet. App. 119a–20a. But the 2009 statement expressly invoked and reiterated the arguments in the Ministry's two prior submissions, JA247–48, which provided much of the specific citation to Chinese law that the district court appeared to seek, Pet. App. 189a–223a; JA131–33.

Second, the district court said the 2009 statement contained "ambiguous terms and phrases," Pet. App. 120a, particularly as to the meaning and consequences of non-compliance with "self-discipline," *id.* at 132a–33a. Both the Ministry and Respondents' expert explained these points, and the district court's desire to see them spelled out in "a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system," Pet. App. 116a, was unrealistic. In China, as in the United States, not all important legal concepts are set forth in positive enactments; for example, what statute would an American lawyer cite to prove the existence of non-retroactivity or qualified immunity?

Third, the district court said the Ministry's 2009 statement failed to "distinguish between" the 1997 and

2002 regulatory regimes, Pet. App. 120a, a criticism Petitioners reprise here (at 14–15). But the Ministry's *amicus* brief—which contained separate sections describing the 1997 "Initial Regulations" and the 2002 "Revised Regulation[s]"—made clear that the 2002 amendments "changed the way in which compliance with the [Chamber of Commerce of Medicines & Health Products Importers & Exporters'] 'coordination' was confirmed." Pet. App. 203a, 208a. Under the new price-verification-and-chop system, or PVC, the Chamber verified each manufacturer's "contract price and volume": "If the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a special seal, known as a 'chop,' on the contract and returned it to the manufacturer." *Id.* at 208a–09a. Export was allowed "only if the contract bore the Chamber's 'chop'"; noncompliance thus meant "denial by Customs of the ability to export." *Id.* at 209a.[9]

As before, the 2002 regime was adopted to "promote industry self-discipline," now based on "industry-wide negotiated prices for those export products subject to price review." JA99–100; see Pet. App. 208a. It was thus based on the same basic concept as before, but implemented differently. Petitioners make much of the fact that the 1997 Charter's requirement to "[s]trictly execute" the coordinated price was "abolished" (Pet. Br. 15 (alteration in original) (emphasis omitted)), but neglect to mention the "resolution" adopted at a Chamber-led meeting in late 2001 that, under the PVC regime, "*[t]he committed export volume as part of the industry self-discipline shall be strictly*

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[9] *Amici* Howson and Clarke suggest (at 21) that Customs might have refused to enforce a regime established by Ministry regulations alone, but ignore that the 2002 Notice issued jointly from both departments, JA99.

implemented." JA459. Non-compliant exporters "will be punished." *Id.*

Further, Petitioners' explanation of the 2002 regime makes no sense. Petitioners urge the same "nonsensical" view the Second Circuit rejected: That even though the PVC regime permitted export only "if the contract met or exceeded an industry-determined minimum export price," it allowed manufacturers to "opt-out" and "did not prohibit exports in the event that [the industry] declined to reach a price agreement in the first place." Pet. Br. 8–9. Such a regulatory program would be pointless. Pet. App. 27a–28a. And the supposed "opt-out" provision does not say what Petitioners claim: It permits the suspension of price review by "the customs and chambers," *not* by individual manufacturers. JA100. There is no allegation that the regulators ever exercised this authority. Nor could manufacturers "opt-out" by resigning from the subcommittee (Pet. Br. 8–9); non-members were also bound to follow the industry-wide negotiated prices because failure to do so would result in the denial of a chop. JA105–06.

Petitioners' reliance on the supposed plain language of the 2002 documents is, like the district court's, misplaced: Petitioners simply assume that Chinese terms which translate as, *e.g.*, "voluntary," mean what they would mean to a U.S. lawyer. *E.g.*, Pet. Br. 7, 9. These misguided assumptions are not a sound basis to reject the Chinese government's official explanation (supported by expert testimony) of what these terms actually mean. *E.g.*, JA139 (Chinese legal expert explaining: "In no way was participation in the process ... 'voluntary' in the sense that it could be ignored.").

Fourth, the district court said, and Petitioners argue, that the Ministry's position here is inconsistent with China's statements to the WTO that it "gave up

'export administration ... of vitamin C' as of January 1, 2002." Pet. App. 120a–21a (omission in original); Pet. Br. 9, 19, 21, 53. This view reflects the same misunderstanding as above: The "export administration" China gave up was not the policy of industrial self-discipline that required price and output coordination, but rather—as the WTO later found—the system of "export quotas and licences" for Vitamin C that China had followed until 2002. WTO, *Trade Policy Review: People's Republic of China*, WT/TPR/S/161, ¶ 141 (Feb. 28, 2006), https://goo.gl/iPtMaZ.[10] The 2002 Notice thus explained that, "in order to accommodate the new situations since China's entry into WTO" *while still* "*promot[ing] industry self-discipline*," certain products were "no longer subject to supervision and review by the customs" but were instead "subject to [PVC] by the chambers." JA99 (emphasis added); JA428–29 (describing the replacement of the 1997 "export licensing" regime with the PVC regime).

The United States agreed. In a 2009 WTO proceeding related to raw materials, it *relied on the Ministry's amicus brief in this case* to argue that "China coordinates export prices for the products at issue *through a 'system of self-discipline'* based on informal statements and oral agreements between traders and export regulators and where the [relevant chamber of commerce] directs commodity-specific branches or coordination

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[10] *Amici* Clarke and Howson, who claim no trade-law expertise (at 1–2), flatly ignore WTO's summation in declaring it "inescapable" (at 17) that China made inconsistent statements. They seem not to have considered the possibility that their lay understanding of trade-law terminology is incorrect.

groups." JA676 (emphasis added).[11] The WTO accepted that position, holding that "China requires exporting enterprises to export at set or coordinated export prices or otherwise face penalties." JA722.[12] Thus, the United States and the WTO both said what MOFCOM has maintained here: after 2002, China was still requiring exporters to follow a price-setting regime, albeit one that took a different form than before.

There is thus no inconsistency that could undermine the Ministry's position. But the district court's error was more fundamental. Even if China's statement regarding giving up "export administration" *could* be read as connoting an abandonment of every form of price or output control for Vitamin C, including industrial self-discipline, that would at most establish that the reading pressed by Petitioners and embraced by the district court is *possible*. Petitioners have never identified any evidence that anyone contemporaneously read the "export administration" statement as they do, and all evidence is that WTO participants did not. In such circumstances, a court should endeavor to reconcile the foreign sovereign's statements, rather

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[11] *See also* First Written Submission of the United States of America, *China—Measures Related To The Exportation Of Various Raw Materials*, WT/DS394/DS395/DS398 ¶ 208 & nn.284–90 (June 1, 2010), https://goo.gl/95Qiwv (relying heavily on the Ministry's brief); Opening Oral Statement of Complainants, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/DS395/DS398 ¶ 31 (Aug. 31, 2010), https://goo.gl/Gqkcp6 (arguing that China maintained "a system that prevents exportation unless the seller meets or exceeds the minimum export price").

[12] This holding belies the notion that the raw-materials proceeding is distinguishable because it focused on whether conduct was "attributable to," rather than "*required*" by, China. SG Br. 31 n.7.

than jump to the conclusion that the supposed inconsistency is a product of deceitful intent. Only if such reconciliation is impossible should the court consider declining to defer. That slow-to-anger approach is supported by the accuracy and comity considerations discussed above, and fully addresses the Solicitor General's (rather alarmist) concern that foreign governments will lightly swap positions and demand deference at each turn. See *McNab* Opp. at 18–19. Because there was no inconsistency here—much less an irreconcilable one—the Second Circuit properly deferred to the Ministry's reasonable interpretation of the regulations it created.

B. The Ministry's Authority To Interpret Its Own Rules Is Beyond Dispute.

Petitioners assert for the first time in this Court that the Ministry may lack authority to interpret its own rules and directives. This untimely argument is frivolous.

The regulations and requirements at issue indisputably fall within the Ministry's jurisdiction as "the highest authority within the Chinese Government authorized to regulate foreign trade." Pet. App. 6a; Foreign Trade Law, art. 3 (promulgated by Standing Comm. Nat'l People's Cong., May 12, 1994, revised Apr. 6, 2004), https://goo.gl/sHn37U ("The [Ministry] is in charge of foreign trade throughout the country pursuant to this Law."). The Ministry "formulates strategies, guidelines and policies concerning domestic and foreign trade and international economic cooperation, drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation," and until 2008 the Chamber operated "under the Ministry's direct and active supervision" as part of "a regulatory pricing regime mandated by the govern-

ment of China." Pet. App. 190a–91a, 196a–97a. Respondents' expert testified below, without contradiction, that the Ministry's "interpretation of its own regulations and policies carries decisive weight under Chinese law." JA142. He was correct. In 2001, China's State Council promulgated rulemaking procedures that empower the Ministry to make and interpret its own regulations. *See* Add. 24–25, Decree of the State Council, People's Republic of China (No. 322), Regulations on Procedures for Formulation of Rules, art. 33 (effective Jan. 1, 2002) ("The power to interpret rules belongs to the formulating organs of rules.... Interpretations of rules have the same force and effect as the rules themselves.").[13]

Further, the Chinese diplomatic note submitted to the Second Circuit, JA782–84, underscored the point: The Ministry's brief stated "the official views of the People's Republic of China," JA131. China spoke here with one voice, and the Second Circuit correctly deferred to the Ministry's reasonable interpretation of Chinese law.

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[13] The English translation in the Addendum was performed by Peking University Law School and retrieved from a Chinese commercial legal database, http://www.lawinfochina.com/, on March 20, 2018.

CONCLUSION

For these reasons and those stated in Respondents' brief, the Court should affirm the judgment below.

Respectfully submitted,

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April 4, 2018

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ADDENDUM

DECREE OF THE STATE COUNCIL OF THE PRC (NO. 322)

Decree of the State Council of the People's Republic of China

(No. 322)

The Regulations on Procedures for the Formulation of Rules were hereby promul-gated and effective as of January 1, 2002.

Premier, Zhu Rongji

November 16, 2001

中华人民共和国国务院令
（第３２２号）

现公布《规章制定程序条例》，自２００２年1月1日起施行。

总理　朱镕基

二００一年十一月十六日

Regulations on Procedures for the Formulation of Rules

规章制定程序条例

Chapter I General Provisions

第一章　总则

Article 1 These Regulations are formulated in accordance with the relevant provisions of the Legislation Law to standardize the procedures for the formulation of rules and to ensure the quality of rules.

第一条　为了规范规章制定程序，保证规章质量，根据立法法的有关规定，制定本条例。

Article 2 These Regulations apply to the project establishment, drafting, examination, decision on, promulgation and interpretation of rules.

The rules formulated in violation of these Regulations are null and void.

第二条 规章的立项、起草、审查、决定、公布、解释，适用本条例。

违反本条例规定制定的规章无效。

Article 3 The formulation of rules shall comply with the legislative principles established by the Legislation Law and conform to the provisions of the Constitution, laws, administrative regulations and other superior laws.

第三条 制定规章，应当遵循立法法确定的立法原则，符合宪法、法律、行政法规和其他上位法的规定。

Article 4 The formulation of rules shall effectively safeguard the lawful rights and interests of citizens, legal persons and other organizations, and while prescribing the obligations they shall perform, provide the corresponding rights they have and the means by which the realization of such rights are guaranteed.

第四条 制定规章，应当切实保障公民、法人和其他组织的合法权益，在规定其应当履行的义务的同时，应当规定其相应的权利和保障权利实现的途径。

制定规章，应当体现行政机关的职权与责任相统一的原则，在赋予有关行政机关必要的职权的同时，应当规定其行使职权的条件、程序和应承担的责任。

The formulation of rules shall embody the principle of uniting the powers and responsibilities of administrative departments, and while vesting necessary powers in the relevant administrative departments, provide the conditions and procedures for executing such powers, as well as responsibilities they shall undertake.

Article 5 The formulation of rules shall embody the spirit of reform, scientifically regulate administrative acts, and promote the shift of government functions towards economic adjustment, social management and public services.

The formulation of rules shall conform to the principle of simplification, unification and efficiency, assign identical or similar functions to one administrative department, and simplify administrative formalities.

第五条 制定规章，应当体现改革精神，科学规范行政行为，促进政府职能向经济调节、社会管理和公共服务转变。

制定规章，应当符合精简、统一、效能的原则，相同或者相近的职能应当规定由一个行政机关承担，简化行政管理手续。

Article 6 Rules are normally titled "provisions" or "mea-sures", but they may not be titled "regulations".

第六条 规章的名称一般称"规定"、"办法"，但不得称"条例"。

Article 7 The wording of rules shall be accurate and concise with the contents of their articles clear, concrete and operable.

In principle, the matters that have been clearly stipulated in laws or administrative regulations shall not be repeatedly provided in rules.

Rules shall not, in principle be arranged into chapters or sections other than the rules that are complex in content.

第七条 规章用语应当准确、简洁，条文内容应当明确、具体，具有可操作性。

法律、法规已经明确规定的内容，规章原则上不作重复规定。

除内容复杂的外，规章一般不分章、节。

Article 8 With regard to matters which involve the powers of two or more departments of the State Council, and for which the conditions for formulating administrative regulations are not yet ripe and the formulation of rules are called for, the relevant departments of the State

第八条 涉及国务院两个以上部门职权范围的事项，制定行政法规条件尚不成熟，需要制定规章的，国务院有关部门应当联合制定规章。

有前款规定情形的，国务院有关部门单独制定的规章无效。

Council shall jointly formulate rules.

Under the circumstances provided in the preceding paragraph, the rules formulated by a relevant department of the State Council on its own are null and void.

Chapter II Project Establishment

第二章 立项

Article 9 The internal institutions or other institutions of departments of the State Council shall apply to such departments for project establishment when they deem that there is a need to formulate departmental rules.

The subordinate working departments of the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and comparatively larger cities or the people's governments at lower levels shall apply to the people's governments

第九条 国务院部门内设机构或者其他机构认为需要制定部门规章的，应当向该部门报请立项。

省、自治区、直辖市和较大的市的人民政府所属工作部门或者下级人民政府认为需要制定地方政府规章的，应当向该省、自治区、直辖市或者较大的市的人民政府报请立项。

of the provinces, autonomous regions, municipalities directly under the Central Government or the comparatively larger cities for project establishment when they deem that there is a need to formulate local government rules.

Article 10 The necessity for formulating rules, the major issues to be solved and main systems to be established, etc. shall be stated in the applications submitted for project establishment of the formulation of rules.

第十条 报送制定规章的立项申请，应当对制定规章的必要性、所要解决的主要问题、拟确立的主要制度等作出说明。

Article 11 The legislative affairs institutions of the departments of the State Council and the legislative affairs departments of the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and the comparatively larger cities (hereinafter referred to as

第十一条 国务院部门法制机构，省、自治区、直辖市和较大的市的人民政府法制机构（以下简称法制机构），应当对制定规章的立项申请进行汇总研究，拟订本部门、本级人民政府年度规章制定工作计划，报本部门、本级人民政府批准后执行。

legislative affairs departments) shall study the applications for project establishment of the formulation of rules on a consolidated basis, draft their own departmental or governmental annual working plans for formulating rules, and submit such plans to their own departments or the people's governments at the same levels for approval before implementation.

The titles of the rules to be formulated, the drafting units, the time for the completion of drafting, etc. shall be clearly provided in the annual working plans for formulating rules.

年度规章制定工作计划应当明确规章的名称、起草单位、完成时间等。

Article 12 The departments of the State Council and the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and the comparatively larger cities shall strengthen leadership over the implementation of their annual

第十二条 国务院部门，省、自治区、直辖市和较大的市的人民政府，应当加强对执行年度规章制定工作计划的领导。对列入年度规章制定工作计划的项目，承担起草工作的单位应当抓紧工作，按照要求上报本部门或者本级人民政府决定。

年度规章制定工作计划在执行中，可以根据实际情况予

working plans for formulating rules. The units charged with the drafting of the rules in the said plans shall lose no time in doing so, and submit the draft rules to their own departments or the people's governments at the same levels for decision as required.

An annual working plan for formulating rules may, in light of actual conditions, be adjusted in the course of its implementation, and additional appraisals shall be carried out for the rules projects to be added.

以调整，对拟增加的规章项目应当进行补充论证。

Chapter III Drafting

第三章　起草

Article 13 The drafting of departmental rules shall be organized by the departments of the State Council; the drafting of local government rules shall be organized by the people's governments of the provinces, autonomous re-

第十三条　部门规章由国务院部门组织起草，地方政府规章由省、自治区、直辖市和较大的市的人民政府组织起草。

国务院部门可以确定规章由其一个或者几个内设机构或者其他机构具体负责起草工作，也可以确定由其法制机构起草或者组织起草。

gions, municipalities directly under the Central Government and the comparatively larger cities.

A department of the State Council may assign one or several of its internal institutions to draft rules, or assign its legislative affairs department to conduct or organize such drafting.

The people's government of a province, an autonomous region, a municipality directly under the Central Government or a comparatively larger city may assign one or several of its departments to draft rules, or assign its legislative affairs department to conduct or organize such drafting.

In drafting rules, relevant experts or organizations may be invited to participate therein, and relevant experts or organizations may also be entrusted with drafting.

省、自治区、直辖市和较大的市的人民政府可以确定规章由其一个部门或者几个部门具体负责起草工作，也可以确定由其法制机构起草或者组织起草。

起草规章可以邀请有关专家、组织参加，也可以委托有关专家、组织起草。

Article 14 In drafting rules, in-depth investigations and researches shall be conducted, practical experience shall be summed up, and the comments of relevant organs, organizations and citizens shall be extensively solicited. The solicitation of comments may take the forms of written correspondence, forums, appraisal meetings, hearings, etc.

第十四条 起草规章，应当深入调查研究，总结实践经验，广泛听取有关机关、组织和公民的意见。听取意见可以采取书面征求意见、座谈会、论证会、听证会等多种形式。

Article 15 When the rules being drafted directly involve the immediate interests of citizens, legal persons or other organizations, and relevant organs, organizations or citizens hold substantive disagreement with the rules being drafted, these rules shall be made public for comments; the drafting units may also hold hearings thereon. A hearing shall be organized in accordance with the following procedures:

第十五条 起草的规章直接涉及公民、法人或者其他组织切身利益，有关机关、组织或者公民对其有重大意见分歧的，应当向社会公布，征求社会各界的意见；起草单位也可以举行听证会。听证会依照下列程序组织：

(1) a hearing shall be open to the public; the drafting unit shall make public the time, venue for, and contents of the hearing 30 days before the hearing is held;

（一）听证会公开举行，起草单位应当在举行听证会的３０日前公布听证会的时间、地点和内容；

(2) the relevant organs, organizations and citizens that participate in a hearing shall have the right to put forward questions and make their comments with respect to the rules being drafted;

（二）参加听证会的有关机关、组织和公民对起草的规章，有权提问和发表意见；

(3) written records shall be made for a hearing to faithfully record the speakers' main viewpoints and reasons thereof; and

（三）听证会应当制作笔录，如实记录发言人的主要观点和理由；

(4) the drafting unit shall seriously study the comments expressed at a hearing, and give explanations on the handling of these comments and the reasons for

（四）起草单位应当认真研究听证会反映的各种意见，起草的规章在报送审查时，应当说明对听证会意见的处理情况及其理由。

such handling when submitting drafted rules for examination.

Article 16 When drafting departmental rules that involve the powers and responsibilities of other departments of the State Council or are closely related to other departments of the State Council, a drafting unit shall adequately solicit the comments of these departments.

When drafting local government rules that involve the powers and responsibilities of other departments of the people's government at the same level or are closely related to other departments at the same level, a drafting unit shall adequately solicit the comments of these departments. A drafting unit shall sufficiently consult with the departments that disagree with its comments; where a consensus is not reached after such sufficient consultations, the drafting unit shall give

第十六条 起草部门规章，涉及国务院其他部门的职责或者与国务院其他部门关系紧密的，起草单位应当充分征求国务院其他部门的意见。

起草地方政府规章，涉及本级人民政府其他部门的职责或者与其他部门关系紧密的，起草单位应当充分征求其他部门的意见。起草单位与其他部门有不同意见的，应当充分协商；经过充分协商不能取得一致意见的，起草单位应当在上报规章草案送审稿（以下简称规章送审稿）时说明情况和理由。

explanations on the circumstances of and the reasons for such non-consensus when it submits the draft rules for examination (hereinafter referred to as the draft for examination).

Article 17 A drafting unit shall, in accordance with the provisions, submit a draft for examination and the explanations thereof, the differing comments on the major issues therein and other relevant materials for examination.

A draft for examination to be submitted for examination shall be signed by the principle responsible person of the drafting unit; a draft for examination jointly drafted by several units shall be signed by the principle responsible persons of the said units.

In the explanations of a draft for examination, the necessity for formulating the rules, the main measures provided there-

第十七条 起草单位应当将规章送审稿及其说明、对规章送审稿主要问题的不同意见和其他有关材料按规定报送审查。

报送审查的规章送审稿，应当由起草单位主要负责人签署；几个起草单位共同起草的规章送审稿，应当由该几个起草单位主要负责人共同签署。

规章送审稿的说明应当对制定规章的必要性、规定的主要措施、有关方面的意见等情况作出说明。

有关材料主要包括汇总的意见、听证会笔录、调研报告、国内外有关立法资料等。

in, the opinions of relevant circles, etc. shall be stated.

The relevant materials mainly include the comments collected from various circles, written records of hearings, reports of investigations and researches and the relevant legislative materials from both at home and abroad, etc.

Chapter IV Examination

第四章 审查

Article 18 Drafts for examination shall be uniformly examined by legislative affairs departments.

Legislative affairs departments shall examine drafts for examination mainly in the following aspects:

第十八条 规章送审稿由法制机构负责统一审查。

法制机构主要从以下方面对送审稿进行审查：

(1) whether they are in conformity with the provisions in Articles 3, 4 and 5 of these Regulations;

（一）是否符合本条例第三条、第四条、第五条的规定；

(2) whether they are in harmony or coordinated with the relevant rules;

（二）是否与有关规章协调、衔接；

(3) whether the comments of the relevant organs, organizations and citizens on the main issues addressed in the draft for examination have been correctly handled;

（三）是否正确处理有关机关、组织和公民对规章送审稿主要问题的意见；

(4) whether they conform to the technical requirements of legislation; and

（四）是否符合立法技术要求；

(5) other items that need to be examined.

（五）需要审查的其他内容。

Article 19 Where a draft for examination fall under one of the following circumstances, the legislative affairs department may table the examination thereof or return it to the original drafting department:

第十九条 规章送审稿有下列情形之一的，法制机构可以缓办或者退回起草单位：

(1) the basic conditions for formulating the rules are not yet ripe;

（一）制定规章的基本条件尚不成熟的；

(2) the relevant institutions or departments disagree greatly with one another on the main systems provided in the draft for examination, and the drafting unit has not consulted with these institutions or departments; or

（二）有关机构或者部门对规章送审稿规定的主要制度存在较大争议，起草单位未与有关机构或者部门协商的；

(3) the submission of the draft for examination does not conform to the provisions in Article 17 of these Regulations.

（三）上报送审稿不符合本条例第十七条规定的。

Article 20 Legislative affairs departments shall send drafts for examination or the main issues that the drafts for examination involve to the relevant organs, organizations and experts for comments.

第二十条 法制机构应当将规章送审稿或者规章送审稿涉及的主要问题发送有关机关、组织和专家征求意见。

Article 21 Legislative affairs departments shall conduct on-spot investigations and researches at the grass root level into the main issues that the drafts for examination involve and solicit the comments of the relevant departments, organizations and citizens at the grass root level.

第二十一条 法制机构应当就规章送审稿涉及的主要问题，深入基层进行实地调查研究，听取基层有关机关、组织和公民的意见。

Article 22 Where a draft for examination involves major issues, the legis-lative affairs department shall hold forums or appraisal meetings participated by relevant departments or experts to solicit comments, and to study and appraise the draft for examination.

第二十二条 规章送审稿涉及重大问题的，法制机构应当召开由有关单位、专家参加的座谈会、论证会，听取意见，研究论证。

Article 23 Where a draft for examination involves the immediate interests of citizens, and the relevant organs, organizations and citizens disagree with one another, and the drafting unit have neither made it

第二十三条 规章送审稿直接涉及公民、法人或者其他组织切身利益，有关机关、组织或者公民对其有重大意见分歧，起草单位在起草过程中未向社会公布，也未举行听证会的，法制机构经本部门或者本级人民政府

public nor held appraisal meetings in the course of its drafting, the legislative affairs department may, upon the approval of its own department or the people's government at the same level, make the draft for examination public or hold hearings thereon.

Where a hearing is held, it shall be organized in accordance with the procedures provided in Article 15 of these Regulations.

批准，可以向社会公布，也可以举行听证会。

举行听证会的，应当依照本条例第十五条规定的程序组织。

Article 24 Where the relevant institutions or departments disagree with one another on issues such as the main measures, administrative systems, the division of powers that a draft for examination involve, the legislative affairs department shall coordinate among these institutions or departments for reaching a consensus; where a consensus is not reached, the main issues, the comments of these institutions or departments and the proposals of the

第二十四条 有关机构或者部门对规章送审稿涉及的主要措施、管理体制、权限分工等问题有不同意见的，法制机构应当进行协调，达成一致意见；不能达成一致意见的，应当将主要问题、有关机构或者部门的意见和法制机构的意见上报本部门或者本级人民政府决定。

legislative affairs department shall be submitted to its own department or the people's government at the same level for decision.

Article 25 A legislative affairs department shall seriously study the comments from various circles, and it shall, upon consultation with the drafting unit, revise the draft for examination, and prepare the draft rules and the explanations thereof. The explanations of the draft rules shall include the main issues to be solved, the main measures to be established by the formulation of rules and the circumstances of consultations with the relevant departments.

A draft rules and its explanations shall be signed by the principle responsible person of the legislative affairs department and he/she shall put forward a suggestion that the draft rules and explanation thereof be submitted to the relevant meeting of its

第二十五条 法制机构应当认真研究各方面的意见，与起草单位协商后，对规章送审稿进行修改，形成规章草案和对草案的说明。说明应当包括制定规章拟解决的主要问题、确立的主要措施以及与有关部门的协调情况等。

规章草案和说明由法制机构主要负责人签署，提出提请本部门或者本级人民政府有关会议审议的建议。

own department or the people's government at the same level for deliberation.

Article 26 A draft rules the drafting of which is conducted or organized by a legislative affairs department shall be signed by the principle responsible person of the said legislative affairs department and he/she shall put forward a suggestion that the draft rules and explanation thereof be submitted to the relevant meeting of its own department or the people's government at the same level for deliberation.

第二十六条 法制机构起草或者组织起草的规章草案，由法制机构主要负责人签署，提出提请本部门或者本级人民政府有关会议审议的建议。

Chapter V Decision and Promulgation

第五章 决定和公布

Article 27 Departmental rules shall be decided at ministerial meetings or general meetings of commissions.

第二十七条 部门规章应当经部务会议或者委员会会议决定。

地方政府规章应当经政府常务会议或者全体会议决定。

Local government rules shall be decided at the executive meetings or the plenary meetings of local governments.

Article 28 When a draft rules is being deliberated, explanations may be made by the legislative affairs department or by the drafting unit as well.

第二十八条 审议规章草案时，由法制机构作说明，也可以由起草单位作说明。

Article 29 The legislative affairs institution shall, on the basis of the deliberation opinions of the relevant meetings, revise the draft rules, prepare the revised draft rules, and submit it respectively to the depart-mental head, or the provincial governor, the chairperson of the autonomous region or the mayor for signing the decree to promulgate the rules.

第二十九条 法制机构应当根据有关会议审议意见对规章草案进行修改，形成草案修改稿，报请本部门首长或者省长、自治区主席、市长签署命令予以公布。

Article 30 It shall be specified that the formulating department, the serial number, the title of rules,

第三十条 公布规章的命令应当载明该规章的制定机关、序号、规章名称、通过日期、施行日期、部门首

the date of adoption, the date of implementation, the signature of the departmental head, or the provincial governor, the chairperson of the autonomous region or the mayor, and the date of promulgation in a decree promulgating rules.

Rules formulated jointly by several departments shall be signed jointly by the heads of the relevant departments for promulgation, and the decree serial number of the department that led the formulating shall be used.

长或者省长、自治区主席、市长署名以及公布日期。

部门联合规章由联合制定的部门首长共同署名公布，使用主办机关的命令序号。

Article 31 Departmental rules shall, upon signature for promulgation, be promptly published in the gazette of the department or in the gazette of the State Council and in the nationally distributed newspapers.

Local government rules shall, upon signature for promulgation, be promptly published in the gazette of the people's government at

第三十一条 部门规章签署公布后，部门公报或者国务院公报和全国范围内发行的有关报纸应当及时予以刊登。

地方政府规章签署公布后，本级人民政府公报和本行政区域范围内发行的报纸应当及时刊登。

在部门公报或者国务院公报和地方人民政府公报上刊登的规章文本为标准文本。

the same level and in the newspapers distributed within their respective administrative areas.

The text of the rules that are published in the departmental gazette, the gazette of the State Council or the gazette of the local people's government is the authentic text.

Article 32 Rules shall be effective 30 days after the date of promulgation; but those rules that involve national security or the determination of foreign exchange rates or monetary policies as well as those the implementation of which will be impeded if they are not implemented promptly may be effective as of the dates of promulgation.

第三十二条 规章应当自公布之日起30日后施行；但是，涉及国家安全、外汇汇率、货币政策的确定以及公布后不立即施行将有碍规章施行的，可以自公布之日起施行。

Chapter VI Interpretation and Submission for the Record

第六章　解释与备案

Article 33 The power to interpret rules belongs to the formulating organs of rules.

The formulating organs shall give interpretations to the rules that fall under one of the following circumstances:

第三十三条　规章解释权属于规章制定机关。

规章有下列情况之一的，由制定机关解释：

(1) the specific meaning of their provisions needs to be further defined; or

（一）规章的规定需要进一步明确具体含义的；

(2) after their formulation, new development makes it necessary to define the basis on which they are applied.

（二）规章制定后出现新的情况，需要明确适用规章依据的。

Interpretations of rules shall be proposed by the legislative affairs departments of the formulating organs with reference to the procedures for the examination of the draft rules

规章解释由规章制定机关的法制机构参照规章送审稿审查程序提出意见，报请制定机关批准后公布。

规章的解释同规章具有同等效力。

for examination, and they shall be promulgated after submission to and approval by the formulating organs.

Interpretations of rules have the same force and effect as the rules themselves.

Article 34 Rules shall, with-in 30 days as of the date of promulgation, be submitted by the legislative affairs departments in accordance with the provisions of the Legislation Law and the Regulations on Submission of Regulations and Rules for the Record to the relevant organs for the record.

第三十四条 规章应当自公布之日起３０日内，由法制机构依照立法法和《法规规章备案条例》的规定向有关机关备案。

Article 35 State organs, social organizations, enterprises and institutions, and citizens may put forward in writing suggestions for reexamination to the State Council where they deem that certain rules contradict with laws

第三十五条 国家机关、社会团体、企业事业组织、公民认为规章同法律、行政法规相抵触的，可以向国务院书面提出审查的建议，由国务院法制机构研究处理。

国家机关、社会团体、企业事业组织、公民认为较大的市的人民政府规章同法律、

or administrative regulations, and such suggestions shall be studied and handled by the legislative affairs department of the State Council.

行政法规相抵触或者违反其他上位法的规定的，也可以向本省、自治区人民政府书面提出审查的建议，由省、自治区人民政府法制机构研究处理。

State organs, social organizations, enterprises and institutions and citizens may also put forward in writing suggestions for reexamination to the people's governments of their respective provinces or autonomous regions where they deem that certain rules formulated by the people's governments of comparatively larger cities contradict with laws or administrative regulations or violate the provisions of other superior laws, and such suggestions shall be studied and handled by the legislative affairs departments of the people's governments of the provinces or autonomous regions.

Chapter VII Supplementary Provisions

第七章 附则

Article 36 Decisions or orders with general binding force to be made or issued by the local people's governments at or above the county level that do not have the power to formulate rules according to law shall be made or issued with reference to the procedures provided in these Regulations.

第三十六条 依法不具有规章制定权的县级以上地方人民政府制定、发布具有普遍约束力的决定、命令，参照本条例规定的程序执行。

Article 37 The departments of the State Council and the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government as well as the people's governments of the comparatively larger cities shall frequently sort out their rules, and promptly revise or repeal those rules that are found to be inconformity with new enacted laws, administrative regulations or the provisions of

第三十七条 国务院部门，省、自治区、直辖市和较大的市的人民政府，应当经常对规章进行清理，发现与新公布的法律、行政法规或者其他上位法的规定不一致的，或者与法律、行政法规或者其他上位法相抵触的，应当及时修改或者废止。

修改、废止规章的程序，参照本条例的有关规定执行。

other superior laws or are found to be in contradiction with laws, administrative regulations or other superior laws.

The procedures for the revisions of and repeal of rules shall be implemented with reference to the relevant provisions of these Regulations.

Article 38 The editing and publication of the collections of rules in official editions, in the languages of ethnic groups and in foreign languages shall be handled by legislative affairs departments in accordance with the relevant provisions in the Provisions on Administration of Editing and Publication of Collections of Regulations.

第三十八条 编辑出版正式版本、民族文版、外文版本的规章汇编，由法制机构依照《法规汇编编辑出版管理规定》的有关规定执行。

Article 39 These Regulations shall be effective as of January 1, 2002.

第三十九条 本条例自２００２年１月１日起施行。

No. 16-1220

In The
Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL.,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.,

Respondents.

Brief Of Professors Of Conflict Of Laws And Civil Procedure As *Amici Curiae* In Support Of Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICI CURIAE*

Amici curiae are professors of conflict of laws and civil procedure with expertise in the rules governing the determination of foreign law. They have a strong interest in the proper application of these rules by U.S. courts. The *amici curiae* are professors of conflict of laws and civil procedure: George A. Bermann, Walter Gellhorn Professor of Law and Jean Monnet Professor of EU Law at Columbia Law School; Pamela K. Bookman, Assistant Professor of Law at Temple University Beasley School of Law; Andrew Bradt, Assistant Professor of Law at the University of California, Berkeley School of Law; Stephen B. Burbank, David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School; Kevin M. Clermont, Ziff Professor of Law at Cornell Law School; Zachary D. Clopton, Assistant Professor of Law at Cornell Law School; Laura E. Little, Charles Klein Professor of Law and Government at Temple University's Beasley School of Law; Ralf Michaels, Arthur Larson Professor of Law at Duke University School of Law; Kermit Roosevelt, a Professor of Law at the University of Pennsylvania Law School; Louise Ellen Teitz, Distinguished Service Professor of Law at Roger Williams University School of Law, Bristol, Rhode Island; Christopher A. Whytock, Professor of Law at the University of California, Irvine, School of Law. A detailed list of *amici* and their qualifications is provided in the appendix.[1]

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[1] All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in

SUMMARY OF ARGUMENT

The Second Circuit held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 189 (2d Cir. 2016). This "bound-to-defer" rule is incorrect and unwise.

First, the "bound-to-defer" rule is inconsistent with basic American conflict-of-laws principles governing the determination of foreign law. It is inconsistent with Federal Rule of Civil Procedure 44.1's broad authorization for U.S. courts to "consider any relevant material or source" when determining foreign law. It is inconsistent with the principle that determinations of foreign law should be accurate. And it is inconsistent with the principle of judicial independence in the determination of foreign law.

Second, the "bound-to-defer" rule is inconsistent with foreign and international practice. In most other countries, information about foreign law is not binding on courts. Moreover, the world's two main treaties on the interpretation of foreign law expressly provide that information supplied by

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part, and no person other than *amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

foreign governments in accordance with those treaties is not binding on courts. Simply put, foreign governments do not expect each other's courts to be "bound to defer" to each other's interpretations of foreign law, much less the interpretation of *one executive agency* of a foreign government.

Third, there are important reasons why deference principles should be kept separate from the principles governing the determination of foreign law. The Second Circuit's "bound-to-defer" rule would inappropriately delegate to foreign governments power to influence the application of domestic law—and hence the implementation of domestic policy—in a wide range of cases in which the proper application of U.S. law depends on the determination of foreign law. In addition, international comity does not require U.S. courts to defer to foreign governments in the determination of foreign law. International comity is a traditional rationale for choice-of-law rules that require the application of foreign law as a rule of decision under specified circumstances. But in this case, foreign law is at issue because the application of U.S. law depends on the interpretation of foreign law, *not* because choice-of-law rules require the application of foreign law. Therefore, this case does not implicate the comity rationale for choice-of-law rules. Moreover, the concerns that animate comity doctrines are not the same as those that animate the rules governing the determination of foreign law. The former are concerned with the respect owed between governments, whereas the latter are concerned with ensuring that U.S. courts independently and accurately determine the content

of foreign law. In fact, the "bound-to-defer" rule raises issues that are likely to pose significant comity concerns that the ordinary Rule 44.1 approach avoids. U.S. courts can still address comity concerns—separately from their independent determination of foreign law.

To be sure, U.S. courts should give respectful consideration to a foreign government's statements about its law. But as a matter of law, a foreign government's statements cannot be binding on U.S. courts. Instead, U.S. courts should accurately and independently determine the meaning of foreign law taking into account not only the foreign government's own statements, but also other relevant information about that law. This independent approach is especially important when—as in this U.S. antitrust case and many other cases—the proper application of American law depends on a determination of foreign law.

I. THE SECOND CIRCUIT'S "BOUND-TO-DEFER" RULE IS INCONSISTENT WITH BASIC AMERICAN CONFLICT-OF-LAWS PRINCIPLES.

Federal Rule of Civil Procedure 44.1 authorizes U.S. courts to "consider any relevant material or source" when determining foreign law. The Second Circuit's "bound-to-defer" rule is inconsistent with this broad authorization. The Second Circuit's rule also is inconsistent with the basic American conflict-of-laws principles that U.S. courts should determine foreign law accurately and that they should do so independently.

A. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 44.1.

Rule 44.1 authorizes courts to "consider any relevant material or source" when determining foreign law. Fed. R. Civ. P. 44.1. Relevant material may include primary sources (such as constitutions, statutes, regulations, and court decisions), secondary materials (such as treatises and other books, legal periodicals, and other legal commentary on foreign law), and expert advice (such as expert opinions of lawyers, judges, and scholars). *See* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed.).

The text of Rule 44.1 places no limitations on this broad authorization. Moreover, the official advisory notes to Rule 44.1 do not indicate that any exception was intended—even when a foreign government is one of the sources of information about foreign law. To the contrary, as the Rules Advisory Committee explained, Rule 44.1 provides that "the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found." Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966. By authorizing U.S. courts to consider any relevant material or source, Rule 44.1 helps ensure that U.S. courts have the flexibility to obtain the information they need to determine foreign law accurately. *See infra* Part I.B; Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 (noting that "the rule provides flexible procedures for presenting and utilizing material on issues of foreign

law by which a sound result can be achieved with fairness to the parties").

The Second Circuit's "bound-to-defer" rule would limit the authority that Rule 44.1 grants to the courts. By making foreign government statements binding, the Second Circuit's rule would not allow U.S. courts to "consider any relevant material or source" when determining foreign law. Instead, whenever a foreign government makes statements about its law that are "reasonable under the circumstances," U.S. courts would be required to determine foreign law according to those statements—regardless of the reliability of those statements, and regardless of other reliable and persuasive information that might compel a different determination. For example, the "bound-to-defer" rule would prevent a U.S. court from considering foreign legislative records or foreign judicial decisions that might undermine or provide perspective for the interpretation proffered by a foreign executive agency. Thus, the Second Circuit's rule would effectively amend Rule 44.1 by creating an exception to Rule 44.1's broad authorization in cases in which foreign governments provide information about foreign law. Any amendment to Rule 44.1 should be made pursuant to the federal rulemaking process. *See* 28 U.S.C. §§ 2072 *et seq.*

The Second Circuit attempts to avoid this conclusion by reasoning that "Rule 44.1 explicitly focuses on ***what*** a court may consider when determining foreign law, but is silent as to ***how*** a court should analyze the relevant material or sources. Thus, courts must still evaluate the relevant

source material within the context of each case." *In re Vitamin C*, 837 F.3d at 187. But this reasoning cannot be reconciled with the "bound-to-defer" rule. If a foreign government's statements were binding on a U.S. court, consideration of other material would be meaningless, for it would not be allowed to influence the court's determination, even if that material is highly accurate and reliable. Rule 44.1, after all, calls for courts to "consider" relevant sources. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining consider as "to think about carefully" as in "to think of esp. with regard to taking some action" or "to take into account"); WEBSTER'S COLLEGIATE DICTIONARY (5th ed. 1948) (defining consider as "to think on with care"). At most, the Second Circuit's rule would allow U.S. courts to consider other material for the narrow purpose of determining whether a foreign government's interpretation is "reasonable under the circumstances presented"—but even with this qualification, the "bound-to-defer" rule would not allow courts to "consider *any* relevant material or source" for the fundamental purpose of determining foreign law accurately, as Rule 44.1 authorizes (emphasis added).

To support its "bound-to-defer" rule, the Second Circuit relies on *United States v. Pink*, 315 U.S. 203 (1942). This reliance is misplaced. Most importantly, for the reasons just given, the Second Circuit's reading of *Pink* as stating a "bound-to-defer" rule is inconsistent with Federal Rule of Civil Procedure 44.1, which entered into effect in 1966, more than 20 years after *Pink* was decided.

The Second Circuit discounts the impact of Rule 44.1. *See In re Vitamin C*, 837 F.3d at 188 ("Rule 44.1 does not alter the legal standards by which courts analyze foreign law . . . ."). But by doing so it ignores the important consequences of Rule 44.1's adoption. As Wright and Miller explain: "The procedure for proving foreign law was changed substantially by . . . Rule 44.1. . . . Thus, the trial court's freedom of inquiry no longer is encumbered by any restraint on its research or by the rules of admissibility . . . . Since the rule dissipates former inhibitions on judicial inquiry, the district judge may consider any material the parties wish to present." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed.). Rule 44.1 also abandoned the treatment of foreign law issues as issues of fact, and established that a determination of foreign law instead "must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 ("[T]he court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact'. . . .").

Moreover, *Pink* was an appeal from a New York state court, and both the state court and this Court applied New York state law to determine the content of foreign law in that case. *See* 315 U.S. at 217-22 (discussing New York Civil Practice Act § 391 and its requirement to treat certain "written authorities" as "presumptive evidence" of foreign law); *see also* Fed. R. Civ. P. 43(a) (calling for district courts, at the time of *Pink*, to apply state evidence law in some circumstances). One purpose of Federal Rule 44.1—and of the Federal Rules more

generally—was to provide a uniform federal approach to questions of procedure, including the determination of foreign law. The first sentence of the Advisory Committee Notes accompanying the first version of Rule 44.1 stated: "Rule 44.1 is added by amendment to furnish Federal courts with a *uniform* and effective procedure for raising and determining an issue concerning the law of a foreign country." Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 (emphasis added). The Notes further explained that the authorization to "consider any relevant material or source" was explicitly designed to end the reliance on variable and often undesirable state laws. *See id.*[2] For reasons we explain shortly, we see no conflict between *Pink* and Rule 44.1. But even if there were a conflict, Rule 44.1 would control today.

Furthermore, it is far from clear that *Pink* stands for the general proposition that U.S. courts are "bound to defer" to foreign government statements. Although this Court in *Pink* found a declaration of the Russian Commissariat for Justice

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[2] Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 ("Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43.") (citation omitted).

interpreting Russian law to be conclusive *in the particular circumstances presented*, this Court announced no rule in *Pink* requiring that foreign government statements be binding on U.S. courts *in general*. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 11 ("This Court's holding [in *Pink*] that the Commissariat's declaration was 'conclusive' under those circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.").

Even if *Pink* is read as stating a general rule of deference—which it does not—it may be read as a *conditional* deference rule—not a categorical rule as suggested by the Second Circuit. *See Pink*, 315 U.S. at 220 (explaining that, prior to treating the declaration as conclusive, this Court determined that "the evidence supported [the] finding[] that the Commissariat for Justice has power to interpret existing Russian law"); *id.* at 218 (explaining that, although this Court "[did] not stop to review all the evidence in the voluminous record" on the question of Russian law, it accepted the stated interpretation only after observing "that the expert testimony tendered by the United States gave great credence to its position"). Thus, *Pink* arguably stands only for the proposition that courts *may* treat foreign government statements about foreign law as conclusive *if* evidence shows that the foreign government agency making the statement is authorized to interpret foreign law *and* there are other persuasive sources or materials that are consistent with that interpretation.

B. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH THE PRINCIPLE THAT U.S. COURTS SHOULD ACCURATELY DETERMINE FOREIGN LAW.

A basic principle governing the determination of foreign law under Rule 44.1 is that courts should determine foreign law accurately. *See Rationis Enterprises Inc. v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 586 (2d Cir. 2005) ("Ultimately, the responsibility for correctly identifying and applying foreign law rests with the court."); *see also* Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 728 (1967) ("Rule 44.1 expresses a philosophy that federal courts should ascertain foreign law accurately whenever possible."). The accurate determination of foreign law requires that it be considered in light of how it is authoritatively interpreted and applied in the foreign country. *See de Fontbrune v. Wofsy*, 838 F.3d 992, 994, 1003 (9th Cir. 2016) (noting that the issue of French law governing remedy was "not a simple matter of translation" but "requires a broader look at French law to understand the nature of the . . . remedy" and how it functions in France, including an inquiry into how the remedy is actually used in the French legal system); *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 639 (7th Cir. 2010) (Wood, J., concurring) (arguing that court's understanding of foreign law should not be merely "theoretical" but instead should take into account "day-to-day realities of the practice of law" in the foreign state). The approach of the Second Circuit

effectively reverts to treating foreign law as a question of fact in which a foreign government's statement is accepted as "truth," ignoring Rule 44.1's directive to weigh the available information. *See Madanes v. Madanes*, 186 F.R.D. 279, 283 (S.D.N.Y. 1999) ("Since foreign law is an issue of law rather than of fact, it is not the credibility of the experts that is at stake, but rather the persuasiveness of their opinions.").

The principle of accuracy implies that a court must consider information about foreign law based on how reliable and persuasive the information is. *See Bodum*, 621 F.3d at 628 (majority opinion) ("Judges should use the best of the available sources."); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed.) ("[O]ne of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials. To effectuate this policy, the court is obliged to take an active role in the process of ascertaining foreign law.").

Reliable and persuasive information may, of course, come from a foreign government. But being a foreign government agency or official is not by itself a sufficient indicator of reliability and persuasiveness, because the reliability and persuasiveness of foreign government statements depend on many other factors. These include: (1) whether the specific agent of the foreign government making the statement about foreign law is authorized to officially interpret that law; (2)

whether the statement is consistent with the same agent's earlier statements; (3) whether the statement is consistent with those made by other agents of the foreign government; (4) whether the statement is consistent with how the foreign government's courts have interpreted that law; (5) whether the statement is consistent with information about that foreign law from other reliable sources; (6) how well-supported the statement is by primary sources of foreign law; (7) how well-reasoned the statement is; (8) the context and purpose of the statement; and (9) whether the statement will be binding in any future proceedings in the foreign state or in a U.S. court. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 8 ("The precise weight to be given to a foreign government's statement turns on factors including the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence.").

Foreign court decisions are generally likely to be more reliable and persuasive sources of information about foreign law than information provided to U.S. courts by executive agencies of foreign governments in the context of pending U.S. litigation—but U.S. courts are not "bound to defer" to foreign court decisions, either.[3]

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[3] Although the conflict-of-laws rules governing foreign judgments ordinarily provide that U.S. courts should generally recognize and enforce those judgments, there are numerous

The pitfalls of relying on a statement about foreign law solely because it is provided by a foreign government agency are illustrated in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003). In that case, defendant was convicted of violating the Lacey Act, which is a U.S. statute that prohibits the importation of "fish or wildlife [that has been] taken, possessed, transported, or sold in violation of . . . any foreign law." *Id.* at 1232 (quoting 16 U.S.C. § 3372(a)(2)(A)). Defendant's conviction was based on a violation of Honduran law. *Id.* at 1232-34. The district court relied on statements of multiple Honduran officials, including a legal officer of a Honduran government ministry made during the investigation and trial, that the relevant law was valid. *Id.* at 1234-35. But after defendant's conviction, the Embassy of Honduras filed an *amicus* brief in support of defendants, arguing that the law "was of no force and effect, because it was not adopted in accordance with Honduran law and thus it could not legally provide the basis for any violation of Honduran law." Brief Amicus Curiae of the Embassy of Honduras and the Asociacion de Pescadores del Caribe in Support of Defendant-Appellant David Henson McNab, 2002 WL 32595268, at *13. The Court of Appeals for the Eleventh Circuit held that it would not defer to the new Honduran position. *McNab*, 331 F.3d at 1242. The Eleventh Circuit insisted that "[w]e must have

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grounds for refusing recognition and enforcement. *See, e.g.*, Uniform Foreign-Country Money Judgments Recognition Act § 4, available at http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf.

consistency and reliability from foreign governments with respect to the validity of their laws." *Id.*

A fundamental flaw of the Second Circuit's "bound-to-defer" rule is that it would prevent courts from independently weighing information about foreign law in accordance with these and other available indicia of reliability and persuasiveness. The Second Circuit's rule would require courts to determine foreign law in accordance with a foreign government's statements even if those statements have a lower degree of reliability or persuasiveness than other information before the court. Indicia of reliability and persuasiveness would only matter if they so clearly tilted against a foreign government's statements as to render them not "reasonable under the circumstances." *In re Vitamin C,* 837 F.3d at 189. The principle behind the determination of foreign law, however, is to arrive at an accurate determination, not merely a reasonable one.

This flaw is especially serious at the appellate level. As the Second Circuit correctly observed, "[t]he determination of foreign law is 'a question of law, which is subject to *de novo* review.'" *Id.* at 183. A primary purpose of de novo review is to ensure that an appellate court can correct a district court's inaccurate determination of the content or meaning of foreign law. *See McKesson Corp. v. Islamic Republic of Iran,* 753 F.3d 239, 242 (D.C. Cir. 2014) (undertaking "de novo review of the district court's *interpretation* of foreign law") (emphasis added); *Iracheta v. Holder,* 730 F.3d 419, 423 (5th Cir. 2013) ("Just like any question of law, '[t]he *content* of foreign law is a question of law and is subject to de

novo review.'") (quoting *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir.1999)) (emphasis added); *see also* Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 ("[T]he court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact,' so that appellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a)."); John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3, 6 n.12 (1983) ("[A]ssurance of the correctness of the content and application of foreign law requires the supervision of appellate review."). Yet the Second Circuit's review was based more on deference than accuracy. As the Second Circuit itself states: "[I]f the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required . . . would have been entirely appropriate." *In re Vitamin C*, 837 F.3d at 191 n.10.

C. THE SECOND CIRCUIT'S RULE VIOLATES THE PRINCIPLE OF JUDICIAL INDEPENDENCE IN THE DETERMINATION OF FOREIGN LAW.

The bedrock principle of judicial independence applies to all determinations of law by U.S. courts, including determinations of foreign law. *See Garcia v. Pinelo*, 808 F.3d 1158, 1163 (7th Cir. 2015) ("'[I]n determining these questions of [foreign] law, both trial and appellate courts are urged to research and analyze foreign law independently.' This is because

'one of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full evaluation of the available materials.'") (citations omitted); *de Fontbrune v. Wofsy*, 838 F.3d 992, 997 (9th Cir. 2016) (stressing "the district court's independent obligation to adequately ascertain relevant foreign law"); *PNC Financial Services Group, Inc. v. C.I.R.*, 503 F.3d 119, 126 (D.C. Cir. 2007) ("[Rule 44.1] direct[s] courts to independently determine issues of foreign law.").

The principle of independence means that a U.S. court cannot be required to defer to information given to it by others, but may instead engage in its own independent research on foreign law. *See Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2002) ("'[F]ederal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities.'") (quoting *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999)); Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 (noting that under Rule 44.1 the court "may engage in its own research and consider any relevant material thus found"); *see also Products and Ventures International v. Axus Stationary (Shanghai) Ltd.*, 2017 WL 201703, at *3 (N.D. Cal. Jan. 18, 2017) ("[A] district court has an 'independent obligation' to ascertain the relevant foreign law. . . . Thus, courts must . . . determine whether submissions from parties are sufficiently reliable."); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444

(3d ed.) ("[F]ederal courts have not felt bound by the testimony of foreign law experts and upon occasion have placed little or no credence in their opinions when not supported adequately or when the views were offered in too partisan a fashion."); *cf. Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (characterizing European Commission as a "tribunal" despite an amicus brief from the European Commission arguing that under European Union law the European Commission did not function as a tribunal).

The Second Circuit's "bound-to-defer" rule violates the principle of judicial independence in two ways. First, it would impose on U.S. courts a particular interpretation of foreign law—that of an appearing foreign government—rather than allowing U.S. courts to determine foreign law independently based on indicia of reliability and persuasiveness such as those discussed above. Second, the "bound-to-defer" rule would render meaningless the authority Rule 44.1 gives courts to do independent research on foreign law. The Second Circuit's "bound-to-defer" rule thus would be just the sort of "judge-made doctrine for the abdication of the judicial duty" to interpret law that has raised concerns in other contexts. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J.). In this case, the bound-to-defer rule would require adopting the Chinese ministry's statement even though the trial court found that "the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008).

II. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH FOREIGN AND INTERNATIONAL PRACTICE.

The Second Circuit's bound-to-defer standard is inconsistent not only with basic American conflict-of-laws principles, but also with foreign and international practice. Foreign courts are not subjected to the "bound-to-defer" rule that the Second Circuit would impose on U.S. courts, and treaties on the determination of foreign law show that foreign governments do not expect that sort of deference from each other. Indeed, the fundamental principles of accuracy and independence in the determination of foreign law that underpin Rule 44.1 are widely recognized in foreign and international practice.

A. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH FOREIGN PRACTICE.

The Second Circuit's bound-to-defer rule would impose a more rigid rule of deference on U.S. courts than foreign countries impose on their own courts. As the United States has stated in this litigation, the Department of Justice "is not aware of any foreign-court decision holding that the Department's representations are entitled to such conclusive weight." Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 11-12.

The United States' assessment is consistent with a recent study of how 34 nations in Europe,

North and South America, the Asia-Pacific Area, and Africa treat foreign law, which found that the large majority of these nations do not require their courts to be bound by information about foreign law. *See* Yuko Nishitani, *Treatment of Foreign Law: Dynamics Towards Convergence?—General Report, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 26 (Yuko Nishitani ed., 2017) ("Information obtained with respect to foreign law is not binding in most jurisdictions. . . . The judge needs to examine the quality of the obtained information in court proceedings, possibly by using additional materials. In light of this, it is sensible policy to exclude the binding force of any information provided in relation to foreign law."); *id.* at 30 ("The effects of the information on foreign law provided by expert witnesses, documents submitted by the parties or any other means is not binding on the judge."); *see also* Maarit Jänterä-Jareborg, *Foreign Law in National Courts: A Comparative Perspective*, 304 RECUEIL DES COURS 281, 287 (2003) (surveying Germany, France, England, Sweden, Norway, Finland, Denmark, Italy, Austria, Switzerland, and a variety of Latin American countries, and concluding that in those jurisdictions "the court is not bound by the information or 'evidence' [regarding foreign law] delivered by the parties, but remains free to assess its reliability and sufficiency"). For example:

- In Germany, "[t]he provided legal information never is binding on the court. Rather, the court retains its responsibility under [the German Code of Civil Procedure] and has to evaluate

the information rendered." Oliver Remien, *Germany: Proof of and Information About Foreign Law–Duty to Investigate, Expert Opinions and a Proposal for Europe*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 183, 203 (Yuko Nishitani ed., 2017).[4]

- In France, a statement about foreign law "is subject to adversarial debate and it is not binding upon the judge who has to verify, among other things, the impartiality" of the statement. Sabine Corneloup, *France–The Evolving Balance Between the Judge and the Parties in France*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 157, 171 (Yuko Nishitani ed., 2017).[5]

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[4] *See* Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 293, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89715/103136/F-842321361/ZPO.pdf, translation at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html ("The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to us other sources of reference as well, and to issue the required orders for such use.").

[5] *See* Code de procédure civile, art. 246, https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=8B6C6B1B7107BAED721D0D2D0500A511.tplgfr27s_1?idArticl

- Spanish law provides that "[n]o report or opinion, national or international, on foreign law, shall be binding for Spanish courts." Carmen Azcárraga Monzonís, *Spain: The Application of Foreign Laws in Spain–Critical Analysis of the Legal Novelties of 2015, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 329, 333 (Yuko Nishitani ed., 2017).[6]

- In Switzerland, "[l]egal information on foreign laws is not binding on Swiss judicial authorities." Ilaria Pretelli & Shaheeza Lalani, *Switzerland: The Principle Iura Aliena Novit Curia and the Role of Foreign Law Advisory Services in Swiss Judicial Practice, in* TREATMENT OF FOREIGN LAW: DYNAMICS

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e=LEGIARTI000006410377&cidTexte=LEGITEXT000006070716&dateTexte=20050514, translation at https://www.legifrance.gouv.fr/content/download/1962/13735/.../Code_39.pdf ("The judge is not bound by the findings or conclusions of the expert.").

[6] *See* Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil, BOE-A-2015-8564, art. 33.4, http://www.boe.es/buscar/doc.php?id=BOE-A-2015-8564, translation in Carmen Azcárraga Monzonís, *Spain: The Application of Foreign Laws in Spain–Critical Analysis of the Legal Novelties of 2015, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 329, 333 (Yuko Nishitani ed., 2017) ("No report or opinion, national or international, on foreign law, shall be binding for Spanish courts.").

TOWARDS CONVERGENCE? 375, 390 (Yuko Nishitani ed., 2017).[7]

- In Japan, "[t]he legal information provided is not binding upon the judicial authorities. Instead, they are obliged to investigate and assess the reliability of the information submitted ex officio." Shunichiro Nakano, *Japan: Proof of and Information About Foreign Law in Japan*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 529, 533 (Yuko Nishitani ed., 2017).

B. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH INTERNATIONAL PRACTICE.

The Second Circuit's "bound-to-defer" rule is also inconsistent with the world's two most important international treaties on the interpretation of foreign law: the European Convention on Information on Foreign Law, June 7, 1968, 720 U.N.T.S. 154, which has 46 parties,[8] and the Inter-American Convention on Proof of and Information on Foreign Law, May 8, 1979, 1439

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[7] *See* Schweizerische Zivilprozessordnung [ZPO], [Civil Procedure Code] Dec. 19, 2008, SR 272, art. 157, translation at https://www.admin.ch/opc/en/classified-compilation/20061121/index.html ("The court forms its opinion based on its free assessment of evidence taken.").

[8] *See* Chart of Signatures and Ratifications of Treaty, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/062/signatures?p_auth=GlHMAlNF.

U.N.T.S. 111, which has 12 parties.[9] Both treaties allow the courts of a party to request information about foreign law from a designated foreign government official. But even when there is a formal request and foreign government reply in accordance with the treaty process, a court is not bound to defer to the foreign authority's reply. European Convention, art. 8 ("The information given in the reply shall not bind the judicial authority from which the request emanated."); Inter-American Convention, art. 6 ("[Parties] shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received."). These treaties "confirm that the court of appeals' rule is out of step with international practice." Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 12 n.2.

These treaties show that foreign countries do not expect each other's courts to be bound to defer. To the contrary, these foreign countries are concerned that a binding approach would violate the principle that courts should independently determine foreign law. As the official Explanatory Report on the European Convention explains, the rule providing that foreign government statements are not binding "was inserted in order to stress the desire of the Convention to respect the courts' independence." Council of Europe, Explanatory Report to the European Convention on Information on Foreign Law, June 7, 1968, at 6, available at https://rm.coe.int/16800c92f3. *See also* Yuko

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[9] *See* General Information of the Treaty, https://www.oas.org/juridico/english/sigs/b-43.html.

Nishitani, *Treatment of Foreign Law: Dynamics Towards Convergence?—General Report*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 56 (Yuko Nishitani ed., 2017) ("[T]he large majority of national reporters argue that the reply should not be binding upon the judge . . . , although this is not a unanimous view. . . . [T]he reply ought to remain non-binding to allow the judge to examine the reliability and accuracy of the provided information and, if it is imprecise or incorrect, conduct further research into the content of foreign law by referring to other sources.").

The United States is not a party to either of these treaties. However, the United States has officially expressed its view to the Hague Conference on Private International Law that any future convention on foreign law should likewise provide that the views of foreign government authorities are not binding on receiving courts. *See* Response of the United States of America to Feasibility Study on the Treatment of Foreign Law Questionnaire, Prel. Doc. No 25 (Oct. 2007), Response to Question 29(c) (answering "YES" to the following question: "Should the information received be non-binding (as opposed to binding)?"), available at https://assets.hcch.net/upload/wop/genaff_pd09us.pdf .

III. DEFERENCE PRINCIPLES SHOULD NOT BE PART OF THE DETERMINATION OF FOREIGN LAW.

A rule requiring deference to foreign government statements about foreign law would not

only undermine the accuracy and independence of U.S. legal judgments, but also have the effect of delegating to foreign governments power to influence the application of domestic law—and hence the implementation of domestic policy—in a wide range of cases in which the proper application of U.S. law depends on the determination of foreign law. Moreover, international comity does not require that U.S. courts be bound to defer to foreign government statements about foreign law. While the ordinary Rule 44.1 approach to issues of foreign law is unlikely to raise comity concerns, a "bound-to-defer" approach may raise such concerns.

A. A RULE REQUIRING DEFERENCE IS INAPPROPRIATE BECAUSE IT WOULD ALLOW FOREIGN GOVERNMENTS TO UNDULY INFLUENCE THE APPLICATION OF U.S. LAW.

The proper application of American law frequently depends on the determination of foreign law. For example, foreign law determines whether foreign corporations have the capacity to sue and be sued in U.S. courts; defendants in breach of contract cases may plead a defense of supervening foreign illegality; domestic statutes may create liability for conduct in violation of foreign law; the protection against self-incrimination may apply to potential foreign prosecutions; courts manage civil discovery in light of foreign laws that affect potential compliance; extraterritorial service of process in federal court is permissible as prescribed by the foreign country's law; foreign laws may be relevant

to venue questions in U.S. courts; laws creating exceptions for double taxation require an assessment of whether foreign tax liability attaches; resolution of various types of disputes requires determination of the validity of a foreign marriage; and—as in this case—foreign law determines whether a party can successfully raise the defense of foreign sovereign compulsion. *See* Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 15-17 (2016) (collecting sources and other examples); *see also The Amistad*, 40 U.S. 518, 520, 593-97 (1841) (Story, J.) (applying this Court's independent interpretation of Spanish law to free captured slaves and to reject as evidence of their ownership the "public documents of the [Spanish] government" that accompanied the vessel).

In these situations the determination of foreign law fundamentally influences the application of *domestic* law and hence the implementation of *domestic* policy. It is therefore crucial that U.S. courts retain the authority to independently determine foreign law in these cases.

The Second Circuit's "bound-to-defer" rule would inappropriately delegate this authority from U.S. courts to foreign government actors by requiring that U.S. courts defer to the determinations of foreign government actors appearing in U.S. court and by barring U.S. courts from independently determining foreign law as they are authorized to do under Rule 44.1. This delegation would allow foreign governments to influence the application of American law in a wide range of cases—even though foreign governments

lack the same interest as U.S. courts in ensuring the proper application of American law. The Second Circuit's "bound-to-defer" rule would have this effect whenever the application of American law depends on the determination of foreign law and a foreign government decides to submit an official statement interpreting that law. For example, the Second Circuit's rule would seem to permit a foreign government to intervene in any case against a foreign corporation and conclusively declare that corporation not capable of being sued in a U.S. court. *See* Fed. R. Civ. P. 17(b)(2) ("Capacity to sue or be sued is determined . . . for a corporation, by the law under which it was organized . . . ."). *See also United States v. McNab*, 331 F.3d 1228, 1242 (11th Cir. 2003) ("[I]t is not difficult to imagine a Lacey Act defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials to invalidate a particular law serving as the basis for his conviction in the United States. . . .There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction.").

In the antitrust setting, there are special reasons for U.S. courts to determine foreign law independently—and not simply defer to foreign government statements about foreign law. In some cases, statements may be submitted "to shield the foreign defendants from liability in the U.S., even if their conduct was anticompetitive." Marek Martyniszyn, *Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases*, 61 ANTITRUST

BULL. 611, 630 (2016). It is neither surprising, nor is it disrespectful to foreign governments, to acknowledge that they, like the United States, will occasionally take litigation positions abroad to promote the interests of their nationals. *See id.* at 641 (observing the possibility that "a [foreign] state participates as amicus before a U.S. court to meet expectations of some local constituencies or lobbying groups"); *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d 522, 552 (E.D.N.Y. 2011) (finding that Chinese ministry's statement "does not read like a frank and straightforward explanation of Chinese law. Rather, it reads like a carefully crafted and phrased litigation position. . . . [A]ll of the points above suggest that the Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law. . . ."); *see also infra* Part III.B (discussing situations in which U.S. courts assess the motives of foreign governments).

This is not to suggest that foreign government statements that are consistent with or motivated by foreign governmental interests, or the interests of foreign businesses, are submitted in bad faith. It merely means that judicial reliance on these statements will not necessarily further the principle of accuracy and could, in some cases, interfere with U.S. law and policy.

B. INTERNATIONAL COMITY DOES NOT REQUIRE DEFERENCE TO A FOREIGN GOVERNMENT'S STATEMENT ABOUT FOREIGN LAW.

Respondent seems to suggest that the Second Circuit's "bound-to-defer" rule is necessary as a matter of international comity to ensure that U.S. courts give "proper respect" to the sovereignty of foreign countries. *See* Brief in Opposition at 26, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., No. 16-1220 (U.S. June 5, 2017). This is incorrect. International comity does not require deference to a foreign government's statement about foreign law.[10]

To be sure, international comity is one traditional rationale for *choice-of-law rules* that call for the *application* of foreign law as a rule of decision under specified circumstances. *See Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of one [country], will, by the comity of nations, be recognised and executed in another . . . ."); JOSEPH

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[10] In other contexts, comity concerns have not prevented this Court from critically characterizing and rejecting foreign government positions in litigation. *See RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2108 (2016) ("refus[ing] to adopt" the position of the European Community and its member states, and referring to the position as a "double standard"); *see also* Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653, 678 et seq. (2016) (discussing numerous other cases in which U.S. courts rejected claims of foreign sovereigns instead of deferring based on comity doctrine).

STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (2d ed. 1841) (1834) ("[The] comity of nations . . . is the most appropriate phrase to express the true foundation and extent of the laws of one nation within the territories of another.").

But this case is different. This case involves the *interpretation* of foreign law, not its application as a rule of decision. And foreign law is at issue because the proper application of domestic law—namely U.S. antitrust law and possible U.S.-law defenses to its application—depends on the determination of foreign law, *not* because choice-of-law rules require foreign law to be applied. *See supra* Part III.A.[11] Therefore, this case does not implicate the international comity rationale underlying choice-of-law rules.

In addition, the concerns that animate the rules governing the determination of foreign law are fundamentally different than those that animate comity doctrines. The former are concerned with ensuring that U.S. courts independently and accurately determine the content of foreign law, whereas the latter are concerned with the respect

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[11] Even in the choice-of-law context, international comity does not *require* deference. It is well established, for example, that a court may decline to apply foreign law that is "contrary to the strong public policy of the forum." Restatement (Second) of Conflict of Laws § 90 (Am. Law Inst. 1971); *see also* STORY, *supra*, § 25, at 31 ("No nation can . . . be required to sacrifice its own interests in favor of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscientious regard for justice and duty.").

owed between governments. *See supra* Part I. Comity considerations should therefore be kept separate from Rule 44.1 and other principles governing the determination of foreign law.

To the extent that this Court is concerned about protecting international comity, nothing in Rule 44.1 undermines other doctrines that protect comity interests directly. There are many "international comity doctrines" that apply in U.S. courts, including the act of state doctrine, presumption against extraterritoriality, foreign state compulsion, recognition of foreign judgments, forum non conveniens, international comity abstention, antisuit injunctions, foreign discovery, foreign sovereign immunity, foreign official immunity, and the right of foreign governments to bring suits in U.S. courts. *See generally* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015). These doctrines are distinct from the question before the Court in this case.[12]

In any event, because the Second Circuit's "bound-to-defer" rule is inconsistent with foreign and international practice, *see supra* Part II, it is unlikely that a foreign government could genuinely view a U.S. court's respectful but independent

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[12] Because the Second Circuit did not rule on Respondent's act of state doctrine and foreign sovereign compulsion defenses, and because this Court decided not to review the Second Circuit's decision to abstain on grounds of international comity, this Court should address only how foreign law should be determined and should not address how any of the international comity doctrines potentially implicated in this case should be applied.

determination of foreign law as a violation of principles of international comity.

More specifically, Respondent suggests that the Second Circuit's "bound-to-defer" rule is necessary to prevent U.S. courts from causing offense to foreign governments by speculating about foreign government motives. *See, e.g.*, Brief in Opposition at 26, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., No. 16-1220 (U.S. June 5, 2017) ("The district court's speculation about the Chinese government's motives illustrate the problem.").

But there is nothing sacrosanct about government motives. *See* Clopton, *supra*, at 10-23 (collecting examples of U.S. courts sitting in judgment of foreign governments, foreign laws, foreign legal acts, foreign legal systems, and foreign government interests). For example, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), this Court held that dismissal of a suit under the act of state doctrine was improper, thus allowing the suit to proceed despite the District Court's finding that the suit could "impugn or question the nobility of a foreign nation's motivations." *Id.* at 408-10. Moreover, in suits against foreign governments under the Foreign Sovereign Immunities Act, U.S. courts may assess the legal liability of foreign governments, which, depending on the elements of the claim, may require courts to make findings about the purpose or intent of foreign government actions. Similarly, the possibility that determinations of foreign law may in some cases touch on foreign government motives

should not interfere with U.S. courts' ability to make those determinations accurately and independently.

Indeed, requiring courts to defer to foreign government interpretations may put undue pressure on courts to rely on other comity doctrines. A court faced with a potentially unreliable foreign government statement should be able to independently evaluate the statement's persuasiveness and then to explain honestly the basis of that independent evaluation. If a court were bound to defer to an unreliable statement, as the Second Circuit's rule would require, then there is a risk that the court would be tempted to invoke abstention-like options that might not otherwise be appropriate. *Cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (describing the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

C. THE SECOND CIRCUIT'S "BOUND-TO-DEFER" APPROACH RAISES COMPLEX QUESTIONS OF FOREIGN LAW THAT MIGHT THEMSELVES RAISE INTERNATIONAL COMITY CONCERNS.

Directing U.S. courts to defer to foreign government determinations of law sounds simple, but in fact this approach would raise challenging questions and would risk offense to international comity, thus undermining its chief justification.

A rule that requires deference to certain foreign government statements implies that courts would have to decide which foreign statements receive this treatment. For example, U.S. courts would presumably have to determine which foreign government institutions are permitted to make authoritative statements about foreign law.[13] This determination likely would require government-by-government assessments, and may vary depending on the allocation of authority within each country (*e.g.*, parliamentary versus presidential versus nondemocratic). The choice also could depend on whether the foreign law in question is judge-made law, legislation, executive order or decree, or administrative regulation. Courts would have to decide how to respond if the foreign government experienced a change in position (or leadership) between the underlying conduct and the litigation, or if two branches of a foreign government submitted conflicting determinations. And at least in some circumstances, the Second Circuit suggests that the "reasonableness" of foreign government statements may still be scrutinized. *See In re Vitamin C*, 837 F.3d at 189.

Asking courts to make these determinations is at least as likely to raise international comity concerns as the existing Rule 44.1 approach. Because the Second Circuit's "bound-to-defer" rule is inconsistent with foreign and international practice,

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[13] In many cases, this authority might be sensibly assumed when the foreign government entity is a foreign country's highest court; but the inquiry may be far more complex when foreign government entities other than courts are involved.

it is unlikely that a foreign government could genuinely view a U.S. court's respectful but independent determination of foreign law in accordance with Rule 44.1 as a violation of principles of international comity. *See supra* Part II. But under the Second Circuit's approach, foreign governments could be offended when U.S. courts categorize some of their government actors as authoritative and others not, and some of their statements "reasonable under the circumstances" and others not.

IV. U.S. COURTS SHOULD GIVE RESPECTFUL CONSIDERATION TO A FOREIGN GOVERNMENT'S STATEMENT ABOUT FOREIGN LAW, BUT THEY STILL MUST DETERMINE FOREIGN LAW INDEPENDENTLY.

U.S. courts should give respectful consideration to a foreign government's statements about its law. *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 92 (2015) ("[O]ur Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices."); *cf. Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006) (noting that the International Court of Justice's interpretation of a treaty "deserves 'respectful consideration,'" but declining to be bound by that interpretation) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)). This respectful consideration is consistent with the principles of judicial independence and accuracy that underpin the determination of foreign law under Rule 44.1.

Indeed, in some cases U.S. courts may find it helpful to actively seek information about foreign law from a foreign government. Efforts to clarify the process for foreign government participation in U.S. litigation should be pursued, and such participation should be encouraged. *See, e.g.*, Communication to Courts, 1978 Digest of United States Practice in International Law ch. 4, § 1 at 560-63 (describing this Court's efforts to encourage foreign governments to directly file amicus briefs rather than communicating to U.S. courts through the State Department). Efforts to formalize inter-court relationships seem especially promising. *See, e.g.*, 11 U.S.C. § 1525 (providing for court-to-court communication in cross-border bankruptcy cases); Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (Feb. 2, 2017), available at http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.aspx (providing for cooperation between New York state courts and the courts of New South Wales in resolution of questions of the other's law); *see also Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1974) (praising the use of the formal certified-question procedure in domestic interjurisdictional cases).

But a foreign government's statements cannot be binding on U.S. courts. Instead, U.S. courts should accurately and independently determine the meaning of foreign law taking into account not only a foreign government's own statements, but also other relevant information about that law, as

expressly authorized by Rule 44.1. This independent approach is especially important when—as in this case and many other cases—the proper application of American law depends on the determination of foreign law. *Cf.* BREYER, *supra,* at 7 ("I do not ignore the basic fact that the American people can and must democratically determine their own laws."). Just as U.S. courts should respectfully consider foreign government statements, foreign governments should respect the independence of U.S. courts when ruling on questions of law.

The Second Circuit's "bound-to-defer" rule is unnecessary to promote the respectful consideration of foreign government statements about foreign law. Rule 44.1—which already authorizes the consideration of "any relevant material or source"—and the principle of accuracy in the determination of foreign law, already ensure this. This case requires no more than reaffirming those basic principles.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[14] Several *amici* are reporters or advisers for restatement and other projects of the American Law Institute, including the Restatement (Third) of Conflict of Laws and the Restatement (Fourth) of Foreign Relations Law. They join this brief in their individual capacity. This brief should not be taken to represent the views of the American Law Institute.

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No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL.,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PROFESSORS OF INTERNATIONAL LITIGATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*

Amici curiae are professors of international litigation with expertise in the various doctrines of U.S. law based on international comity. They have a strong interest in the proper application of these doctrines by U.S. courts. A list of *amici* and their qualifications is provided in the appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners alleged that respondents and their co-conspirators established a cartel to fix the prices of vitamin C exported to the United States in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Respondents did not deny the allegations but rather claimed that their actions had been required by Chinese law, and respondents moved to dismiss the complaints under the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity. *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 180 (2d Cir. 2016). The Ministry of Commerce of the People's Republic of China filed an amicus brief supporting respondents, which represented that under Chinese law all vitamin C legally exported during the relevant time had to be sold at coordinated prices. *Id.* at 182. The district court rejected each of respondents' three defenses, both upon a motion to

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[1] All parties have consented to the filing of this brief. Petitioners' consent is on file with the Clerk. On February 15, 2018, Respondents filed a blanket consent letter with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

dismiss and, following discovery, upon a motion for summary judgment. *Id.* After a jury found respondents liable for violating the Sherman Act, the district court awarded petitioners approximately $147 million in damages and permanently enjoined respondents from further violations of the Sherman Act. *Id.*

On appeal, the Second Circuit declined to address the act of state doctrine or the doctrine of foreign sovereign compulsion. *Id.* at 194. Instead, the court of appeals held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." *Id.* at 179. The court of appeals applied a "multi-factor balancing test," *id.* at 184-85, developed by the Ninth and Third Circuits in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). The Second Circuit read this Court's decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993), as establishing a prerequisite to any such analysis: that complying with both U.S. and foreign law would be impossible. *Vitamin C*, 837 F.3d at 185-86. To answer that preliminary question, the court of appeals had to determine the content of Chinese law and thus "the amount of deference that we extend to the Chinese Government's explanation of its own laws." *Id.* at 186. The court held that it was "bound to defer" to the Chinese Government's representations. *Id.* at 189. It found that respondents could not comply with both U.S. and Chinese law, *id.* at 192, and after weighing the other factors in its multi-factor test, the court of appeals concluded that "the district court abused its discretion by failing to abstain on international

comity grounds from asserting jurisdiction." *Id.* at 194.

Petitioners filed a petition for certiorari presenting three questions: (1) whether the court of appeals erred in reviewing the motion to dismiss rather than the final judgment; (2) whether the court of appeals erred in treating the Chinese Government's representation as conclusive; and (3) whether the court of appeals erred in holding that it could abstain from exercising jurisdiction on a case-by-case basis. In response to this Court's call for the views of the United States, the Solicitor General recommended that the petition be granted limited to the second question presented, noting possible procedural problems with the first and third questions. This Court granted certiorari limited to the second question in the petition.

In answering that question, the Court should take care not to endorse the Second Circuit's doctrine of abstention based on international comity. First, as this Court acknowledged when it limited its grant to the second question, it is not necessary to address abstention to answer the question presented. The principle of international comity is the foundation for many doctrines of U.S. law, each of which has specific requirements tailored to a particular context. How much weight a U.S. court should give as a matter of international comity to the representation of a foreign government about the content of its own law is a separate question from whether a U.S. court should be allowed to dismiss a case over which it has subject matter jurisdiction on the basis of international comity.

Second, the Second Circuit's doctrine of abstention based on international comity conflicts

with the decisions of this Court and threatens to supplant more narrowly tailored doctrines of international comity. Viewed as a doctrine of prescriptive comity, the Second Circuit's doctrine conflicts with this Court's decisions finding that a case-by-case balancing approach is "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); *see also RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2108 (2016) (rejecting "case-by-case inquiry"); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 259 (2010) (criticizing the "methodology of balancing interests"). Viewed as a doctrine of adjudicative comity, the Second Circuit's doctrine runs against the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Second Circuit's doctrine also threatens to supplant more narrowly tailored doctrines of international comity, such as the doctrine of foreign sovereign compulsion and the act of state doctrine that were raised below in this case. This Court has carefully placed limits on each of those doctrines, limits that would effectively become irrelevant if this Court were to endorse the broad doctrine of abstention that the Second Circuit applied.

Having granted certiorari limited to the second question presented, this Court should answer that question only and should not prejudge any of the other comity questions raised by this case.

ARGUMENT

I. IT IS NOT NECESSARY TO ADDRESS ABSTENTION BASED ON INTERNATIONAL COMITY IN ORDER TO ANSWER THE QUESTION PRESENTED

As argued to the courts below, this case involves a number of doctrines based on international comity. Those doctrines include the three defenses raised by respondents and addressed by the district court: the act of state doctrine, the doctrine of foreign sovereign compulsion, and abstention based on international comity. They also include the recognition of foreign law, and as part of that analysis, the question presented in this case of what deference to give a foreign government's representations in determining the content of foreign law. The Second Circuit answered the question presented in the context of applying a doctrine of abstention based on international comity. But those two comity questions are distinct, and it is not necessary for this Court to address abstention based on international comity in order to answer the question presented.

"International comity reflects deference to foreign states that international law does not mandate." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 101 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2017).[2] American law contains many doctrines based

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[2] All tentative drafts of the Fourth Restatement cited in this brief have been approved by the membership of the American Law Institute ("ALI") and represent its official position. The numbering of some of the cited sections will change in the final version of the Fourth Restatement.

on international comity. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2099-2019 (2015) (reviewing doctrines).

Prescriptive comity is the basis for recognizing foreign law, both under conflict-of-laws rules, *see, e.g.*, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of one [country], will, by the comity of nations, be recognized and executed in another . . . ."), and under the act of state doctrine, *see, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918) (noting that the act of state doctrine "rests at last upon the highest considerations of international comity and expediency"). This Court has also held that "principles of prescriptive comity" may limit the reach of U.S. law. *Empagran*, 542 U.S. at 169; *see also RJR*, 136 S. Ct. at 2100 (noting that presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries").

Adjudicative comity is the basis for recognizing foreign court judgments in the United States. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (noting that recognition of foreign judgments depends on "the comity of nations"). Doctrines of adjudicative comity like *forum non conveniens* may also restrain the jurisdiction of U.S. courts. *See RJR*, 136 S. Ct. at 2115 (Ginsburg, J., concurring and dissenting) (noting that "comity concerns" can be met through "the doctrine of *forum non conveniens* [that] enables U.S. courts to refuse jurisdiction");

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publication of which is expected in 2018. Although some of the *amici* worked on the Fourth Restatement, they file this brief in their individual capacities. This brief should not be taken to represent the views of the ALI.

Am. Dredging Co. v. Miller, 510 U.S. 443, 467 (1994) (Kennedy, J., dissenting) (noting that "the *forum non conveniens* defense promotes comity").

Sovereign-party comity is the basis for recognizing foreign governments as plaintiffs in U.S. courts, *see, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964) ("Under principles of comity . . . , sovereign states are allowed to sue in the courts of the United States."), and for restraining the jurisdiction of U.S. courts over foreign governments as defendants under the doctrine of foreign sovereign immunity, *see, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2004) ("Foreign sovereign immunity" is meant "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.").

Some doctrines of international comity are codified in federal or state statutes. *See, e.g.*, Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611); Uniform Foreign-Country Money Judgments Recognition Act (Nat'l Conference of Comm'rs on Unif. State Laws 2005) (adopted in 21 states and the District of Columbia). Some are principles of statutory interpretation. *See, e.g., RJR*, 136 S. Ct. at 2100 (noting presumption against extraterritoriality as "a canon of statutory construction"). Some are doctrines of federal common law, *see, e.g., Sabbatino*, 376 U.S. at 427 ("We conclude that the scope of the act of state doctrine must be determined according to federal law."), and some are doctrines of state common law, *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal

courts must apply state conflict-of-laws rules); *see also Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1973) (holding that *Klaxon* applies in international cases). But each doctrine of international comity has its own requirements. There is no overarching doctrine of international comity that applies in all cases.

In federal courts, the determination of foreign law is governed by Federal Rule of Civil Procedure 44.1. How much weight to give a foreign government's representations about the content of its own law under Rule 44.1 is a question of international comity. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 101 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2017) ("International comity reflects deference to foreign states that international law does not mandate."); *see also* Dodge, *International Comity*, 115 Colum. L. Rev. at 2078 ("International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law."). *Amici* take no position on the question presented, but they note that it is a separate comity question from the question whether a federal court may abstain from exercising jurisdiction based on international comity. Having granted certiorari limited to the second question presented, this Court should answer that question only and should not prejudge any of the other comity questions raised by this case.

II. THE SECOND CIRCUIT'S DOCTRINE OF ABSTENTION BASED ON INTERNATIONAL COMITY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THREATENS TO SUPPLANT MORE NARROWLY TAILORED DOCTRINES OF INTERNATIONAL COMITY

This Court should be particularly careful not to endorse the Second Circuit's doctrine of abstention based on international comity because that doctrine conflicts with the decisions of this Court and threatens to supplant more narrowly tailored doctrines of international comity.

A. THE SECOND CIRCUIT'S ABSTENTION DOCTRINE CONFLICTS WITH THE DECISIONS OF THIS COURT

It is not entirely clear whether the court of appeals decided to abstain as a matter of prescriptive comity or adjudicative comity. On the one hand, the court of appeals reviewed the district court's denial of the motion to dismiss on international comity grounds for abuse of discretion, *Vitamin C*, 837 F.3d at 183, which is typically the standard of review for doctrines of adjudicative comity. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 246, 257 (1981) (adopting abuse of discretion standard for *forum non conveniens*); *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (adopting abuse of discretion standard for international comity abstention). On the other hand, the court of appeals did not apply the requirements for its own adjudicative comity doctrine of "international comity abstention," *Royal & Sun All. Ins.*, 466 F.3d at 92,

which requires both the existence of a pending and parallel foreign proceeding and exceptional circumstances justifying dismissal, *id.* at 93.[3] But no matter how the abstention doctrine applied below is characterized, it conflicts with the decisions of this Court.

1. The Second Circuit's Abstention Doctrine Conflicts With This Court's Prescriptive Comity Decisions

Viewed as a doctrine of prescriptive comity, the Second Circuit's abstention doctrine conflicts with this Court's decisions, which have rejected

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[3] The adjudicative comity doctrine called "international comity abstention" is an extension of *Colorado River* abstention to foreign proceedings. *See Royal & Sun All. Ins.*, 466 F.3d at 93 (relying on *Colorado River*, 424 U.S. 800). Most of the other circuits to have adopted this doctrine also require a showing of pending and parallel foreign proceedings and exceptional circumstances justifying dismissal. *See Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 466-69 (6th Cir. 2009); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 392-94 (3d Cir. 2006); *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 517-23 (7th Cir. 2001); *Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000). Only the Ninth and Eleventh Circuits have authorized such abstention in the absence of a pending and parallel foreign proceeding and exceptional circumstances. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 596-615 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004); *see also* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 304 reporters' note 9 (Am. Law Inst., Tentative Draft No. 2, 2016) (discussing international comity abstention). This case presents no occasion for the Court to address whether *Colorado River* abstention should apply to foreign proceedings.

multi-factor balancing as an approach to determining whether federal statutes apply extraterritorially. The Second Circuit relied on the "multi-factor balancing test," *Vitamin C*, 837 F.3d at 184, developed by the Ninth Circuit in *Timberlane*, 549 F.2d 597, and by the Third Circuit in *Mannington Mills*, 595 F.2d 1287. The court distilled those cases into a ten-factor test, which it referred to as the "comity balancing test." *Id.* at 184-85.[4] Applying those factors to the facts of this case, *see id.* at 192-94, the Second Circuit concluded "that China's 'interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.'" *Id.* at 194 (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987)).

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[4] The ten factors are: "(1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue." *Vitamin C*, 837 F.3d at 184-85 (citing *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 614).

In *Hartford Fire*, the petitioners raised a similar argument, but this Court found it unnecessary to decide whether a federal court may decline to exercise jurisdiction "under the principle of international comity." 509 U.S. at 797. Because the petitioners in *Hartford Fire* did not claim that compliance with both U.S. and foreign law was "impossible," this Court reasoned that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 799.[5] The Second Circuit read *Hartford Fire* "narrowly," "as suggesting that the remaining factors in the comity balancing

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[5] In *Hartford Fire*, Justice Scalia argued in dissent that customary international law requires a balancing of factors in each case to determine if the exercise of jurisdiction is reasonable, relying on Section 403 of the Restatement (Third) of Foreign Relations Law of the United States (Am. Law Inst. 1987). *See Hartford Fire*, 509 U.S. at 818-19 (Scalia, J., dissenting). However, customary international law imposes no such obligation. The International Court of Justice has held that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*." *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 97, 122 (Feb. 3) (quoting *North Sea Continental Shelf (Germ. v. Den.; Germ. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20)). Other jurisdictions have not followed a practice of case-by-case balancing. *See, e.g.*, *A. Ahlström Osakeyhtiö v. Comm'n* ("*Wood Pulp*"), 1988 E.C.R. 5193, ¶¶ 19-23 (European Court of Justice). In the absence of settled state practice, no customary-international-law obligation can exist. For this reason, the Restatement (Fourth) of Foreign Relations Law concludes that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 211 reporters' note 3 (Am. Law Inst., Tentative Draft No. 2, 2016).

test are still relevant to an abstention analysis." *Vitamin C*, 837 F.3d at 185. In so doing, the court of appeals ignored this Court's subsequent decisions, which have repeatedly disapproved a discretionary, case-by-case approach.

In *Empagran*, an antitrust case governed by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, respondents argued that courts could take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Empagran*, 542 U.S. at 168. This Court rejected that argument, concluding that such a case-by-case approach was "too complex to prove workable." *Id.* As an example of this unworkable, balancing approach, the Court cited *Mannington Mills*, *see id.*, one of the two cases from which the Second Circuit drew its multi-factor test. *See Vitamin C*, 837 F.3d at 184. The FTAIA does not apply in the present case because the antitrust claims involve import commerce. *See* 15 U.S.C. § 6a (limiting FTAIA to cases involving trade or commerce "other than import trade or import commerce"). But there is no reason to believe that a case-by-case comity approach is any more workable in antitrust cases not mediated by the FTAIA.

This Court has rejected a case-by-case balancing approach to determine the geographic scope of other statutes as well. Considering the scope of Securities Exchange Act § 10(b) in *Morrison*, the Court criticized the lower courts' "methodology of balancing interests," 561 U.S. at 259, which had led to "the unpredictable and inconsistent application of § 10(b) to transnational cases." *Id.* at 260. Instead, this Court adopted a "clear test" that simply asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic

exchange." *Id.* at 269-70. In *RJR*, this Court considered the geographic scope of RICO, holding that two of its substantive provisions apply extraterritorially to the same extent as RICO's underlying predicate acts, 136 S. Ct. at 2101-03, and that RICO's private right of action requires proof of domestic injury to business or property. *Id.* at 2111. The European Community asked this Court to consider the absence of international friction in cases where foreign governments themselves were plaintiffs, but the Court refused to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign." *Id.* at 2108.

There may be statutes for which additional comity limitations are appropriate even if the presumption against extraterritoriality has been overcome. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 204 cmt. c (Am. Law Inst., Tentative Draft No. 3, 2017) (noting that the presumption against extraterritoriality "does not preclude U.S. courts from interpreting a statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision"). For example, some courts of appeals have applied a choice-of-law analysis to determine the applicability of the avoidance provisions of the Bankruptcy Code. *See French v. Liebmann (In re French)*, 440 F.3d 145, 152-54 (4th Cir. 2006); *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1049 (2d Cir. 1996); *see also* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 204 reporters' note 4 (Am. Law Inst., Tentative Draft No. 3, 2017) (discussing bankruptcy cases).

But there is no overarching doctrine of international comity that gives federal courts case-specific authority not to apply federal law in international cases. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 204 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2017) ("Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law."). What comity limitations are appropriate will vary from statute to statute. *See id.* cmt. d ("U.S. courts have construed statutory provisions to include a variety of other comity limitations depending on the text, history, and purpose of the particular provision."). In the context of antitrust law, in particular, this Court has rejected the Second Circuit's approach as "too complex to prove workable." *Empagran*, 542 U.S. at 168.

2. The Second Circuit's Abstention Doctrine Conflicts With This Court's Adjudicative Comity Decisions

Viewed as a doctrine of adjudicative comity, the Second Circuit's doctrine runs against the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817; *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (observing that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"). This obligation to exercise jurisdiction is subject to certain exceptions. Federal courts may decline to hear a case "where the relief being sought is equitable in nature or otherwise discretionary," such as a declaratory

judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996). In actions at law, federal courts may stay their proceedings in deference to other federal courts, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and may decline jurisdiction in favor of state courts under narrowly circumscribed abstention doctrines and in other "exceptional" circumstances, *Colorado River*, 424 U.S. at 818. Federal courts may also decline jurisdiction in favor of foreign courts under the doctrine of *forum non conveniens*, provided that "there exists an alternative forum." *Piper*, 454 U.S. at 254 n.22; *see also* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 304 cmt. i (Am. Law Inst., Tentative Draft No. 2, 2016) (noting that "*forum non conveniens* is the only doctrine under which the Supreme Court has approved dismissal in favor of foreign courts").

None of these exceptions to the federal courts' general obligation to exercise their jurisdiction authorizes the abstention doctrine based on international comity that the Second Circuit applied in this case. Petitioners' Sherman Act claim was an action for damages, although the district court also granted injunctive relief. The Second Circuit did not abstain in favor of another federal or state court. Respondents did not seek dismissal under the doctrine of *forum non conveniens*. Indeed, the Second Circuit conceded that petitioners "may be unable to obtain a remedy for Sherman Act violations in another forum." *Vitamin C*, 837 F.3d at 193. The court of appeals' suggestion that "complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes," *id.*, ignores petitioners' rights to seek

compensation for antitrust injuries under federal law and the federal court's obligations to decide those claims. As Justice Scalia noted, writing for a unanimous Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), "[t]he short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

B. THE SECOND CIRCUIT'S ABSTENTION DOCTRINE THREATENS TO SUPPLANT MORE NARROWLY TAILORED DOCTRINES OF INTERNATIONAL COMITY

The Second Circuit's doctrine threatens to supplant more narrowly tailored doctrines of international comity, such as the doctrine of foreign sovereign compulsion and the act of state doctrine that were raised below in this case. This Court has carefully placed limits on each of those doctrines, limits that would effectively become irrelevant if this Court were to endorse the doctrine of abstention that the Second Circuit applied.

This Court has recognized the doctrine of foreign sovereign compulsion in the context of U.S. court orders for the production of evidence. *See Societe Internationale pour Participation Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). *Rogers* held that dismissal of a complaint was too harsh a sanction for noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. This Court has not found it necessary to decide whether

foreign sovereign compulsion is a valid defense to antitrust claims, *see Hartford Fire*, 509 U.S. at 799 (noting that compliance with both U.S. and foreign law was not "impossible"); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986) ("Our decision makes it unnecessary to reach the sovereign compulsion issue."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (noting that there was "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing"), but lower courts have recognized the doctrine as a defense in antitrust cases. *See, e.g., Mannington Mills*, 595 F.2d at 1293-94; *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970); *see also* Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation § 4.2.2 (2017) (recognizing foreign sovereign compulsion defense to antitrust claims). Where courts have recognized the doctrine of foreign sovereign compulsion, they have generally imposed two requirements: (1) that "the person in question appears likely to suffer severe sanctions for failing to comply with foreign law"; and (2) that "the person in question has acted in good faith to avoid the conflict." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 222 (Am. Law Inst., Tentative Draft No. 2, 2016).

The Second Circuit's discretionary abstention doctrine would supplant the more narrowly tailored doctrine of foreign sovereign compulsion. Before abstaining on grounds of international comity, the court of appeals did not require a showing that respondents would be likely to suffer severe

sanctions or even that respondents' conduct had been compelled. Instead, the court held that "[e]ven if Defendants' specific conduct was not compelled by [Chinese law], that type of compulsion is not required" under the comity balancing test. *Vitamin C*, 837 F.3d at 192. Neither did the court of appeals require a showing that respondents had acted in good faith to avoid the conflict. Instead, the court held that "[w]hether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant" under the test it applied. *Id.* at 191. By allowing dismissal of an antitrust claim as a matter of international comity without a showing of either severe sanctions or good faith, the Second Circuit's abstention doctrine effectively makes the more limited doctrine of foreign sovereign compulsion obsolete.

This Court has also emphasized the limits of the act of state doctrine. That doctrine provides that, "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of the official act of a foreign sovereign performed within its own territory." Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 221(1) (Am. Law Inst., Tentative Draft No. 2, 2016). This Court unanimously held in *Kirkpatrick* that the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." 493 U.S. at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). *Kirkpatrick* emphasized that "[t]he act of state doctrine is not some vague doctrine of abstention." *Id.* at 406.

The Second Circuit's comity balancing test is precisely the sort of "vague doctrine of abstention" that this Court rejected in *Kirkpatrick*. *Id.* at 406. Although the court of appeals did not reach respondents' act of state defense, *Vitamin C*, 837 F.3d at 194, the court did rely on one of its own pre-*Kirkpatrick* act of state decisions to support the comity balancing analysis. In considering the relevance of respondents' conduct in establishing the Chinese export regime, the Second Circuit reasoned that "inquiring into the motives behind the Chinese Government's decision to regulate the vitamin C market in the way it did is barred by the act of state doctrine." *Id.* at 191 (citing *O.N.E. Shipping*, 830 F.2d at 452). Under *Kirkpatrick*, however, the fact that a claim requires "imputing to foreign officials" even "an unlawful motivation," 493 U.S. at 401, is not sufficient to invoke the act of state doctrine, which applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud*, 246 U.S. at 310). Under the Second Circuit's doctrine of abstention, that limitation of the act of state doctrine becomes irrelevant. Although the act of state doctrine is limited to claims that require a U.S. court to declare invalid the official act of a foreign sovereign, the Second Circuit's discretionary abstention doctrine is not.

At the end of its opinion, the Second Circuit noted: "Because we reverse and remand for dismissal on the basis of international comity, we do not address the act of state, foreign sovereign compulsion, or political question defenses." *Vitamin C*, 837 F.3d at 194. If this Court were to endorse the Second Circuit's abstention doctrine, this is likely to

become an increasingly frequent disposition. Discretionary abstention as a matter of international comity would come to supplant the more narrowly tailored international-comity doctrines that this Court has developed.

CONCLUSION

How much weight to give the representations of foreign governments about the content of their own laws is a question of international comity, but it is a question that is separable from whether a federal court may abstain from exercising jurisdiction on grounds of international comity. In answering the question presented, this Court should not endorse the abstention doctrine applied by the Second Circuit, which conflicts with the decisions of this Court and threatens to supplant more narrowly tailored doctrines of international comity.

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APPENDIX

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